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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY

HORACE GRAY, JR.

VOLUME IX.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. GEORGE T. BIGELOW.
HON. BENJAMIN F. THOMAS.
HON. PLINY MERRICK.

ATTORNEY GENERAL.

HON. JOHN H. CLIFFORD.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, SEPTEMBER TERM 1857, AT WORCESTER.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. BENJAMIN F. THOMAS,
} JUSTICES.

COMMONWEALTH *vs.* DAN REILY.

A complaint which avers that the defendant "at Blackstone in the county of Worcester did convey from place to place within said commonwealth intoxicating liquor," in violation of *St.* 1855, *c.* 215, § 20, does not sufficiently state the places from which and to which the liquor was conveyed.

COMPLAINT averring that the defendant, on the 13th of March 1856, "at Blackstone in the county of Worcester did convey from place to place within said commonwealth intoxicating liquor," in violation of St. 1855, *c.* 215, § 20, which provides for the punishment of "every person who shall bring into this state, or who shall convey from place to place within the same any spirituous or intoxicating liquor, with intent to sell the same," in violation of this act. The defendant, after

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conviction in the court of common pleas, moved in arrest of judgment, because the complaint did not set out with sufficient certainty the places within the Commonwealth from which and to which the liquor was conveyed. *Mellen*, C. J. overruled the motion, and the defendant alleged exceptions.

G. F. Verry, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Bigelow, J. The complaint in the present case does not conform to the familiar rule of criminal pleading, which requires that all the essential elements which constitute the offence intended to be set out should be alleged with such certainty and precision, that the defendant may thereby know the criminal act with which he is charged. It does not allege from what place or to what place the liquor was conveyed; whether from one place in a town or city to another place in the same town or city, or from one town or city to another. It does not describe the criminal transportation so as to identify it, nor does it show either directly or by necessary implication where any part of the act was committed. The only averment of place is the usual venue, necessary to give jurisdiction of the crime. If this form of complaint is valid, then it would be competent under it to prove any act of transportation of liquor contrary to the statute within the limits of the county. *Commonwealth* v. *Tolliver*, 8 Gray, 386, and cases cited. It is therefore clear that the averment in the complaint gives to the party charged no information of the particular act relied on by the prosecution and which he is to meet at the trial. It leaves it wholly indefinite. The act is one susceptible of a precise and accurate description, so that its identity can be fully understood, and there is no good reason for sanctioning any laxity of pleading in the mode of setting out the offence. It is not sufficient to set out the charge in the words of the statute. It is well settled that such description is insufficient, if it fails in the necessary certainty and precision required by the rules of pleading.

Judgment arrested.

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COMMONWEALTH *vs.* CHARLES GILLAND.

A complaint which avers, in the form prescribed by *St.* 1855, *c.* 397, that the defendant "did keep intoxicating liquor with intent to sell the same in this commonwealth, he not being authorized to sell," &c., charges substantially and formally, within the twelfth article of the Declaration of Rights, a keeping of such liquor with intent to sell, in violation of *St.* 1855, *c.* 215, § 24.

The *St.* of 1838, *c.* 147, § 2, authorizing any police court to appoint a clerk, extends to a police court established since, even if by the act establishing it the clerk's duties are imposed on the justice.

COMPLAINT to the police court of Milford, under *St.* 1855, *c.* 215, § 24, averring that the defendant, on the 4th of August 1856, at Milford, "did keep intoxicating liquor with intent to sell the same in this commonwealth, he the said Charles Gilland not being authorized to sell the same in said commonwealth for any purpose under the provisions of" *St.* 1855, *c.* 215, "or by any legal authority whatever; against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided." The copies of papers returned to the court of common pleas were attested "Theodore M. Daggett, Clerk."

In the court of common pleas, the defendant pleaded *nolo contendere*, and moved in arrest of judgment, "because said complaint is informal, insufficient and fatally defective, in that it contains no allegation that the defendant unlawfully kept the said liquor," and "in that said complaint contains no allegation that said liquors were kept with intent unlawfully to sell the same;" and because the copies of the papers were not attested by the justice of the police court. *Mellen*, C. J. overruled the motion, and the defendant alleged exceptions.

D. Foster, for the defendant. 1. The essence of the crime charged consists in keeping intoxicating liquors with the intent to sell them in an illegal manner. But this complaint does not show that the defendant did not design to sell in some legal way, or after having obtained authority. Its only allegations are that the defendant kept; that he intended to sell; that he

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was not authorized to sell. The very statute which creates this offence and enacts the penalty uses the expression "with intent to sell contrary to the provisions of this act." *St.* 1855, *c.* 215, § 24.

The fact that the complaint is in the form prescribed by *St.* 1855, *c.* 397, does not make it sufficient, if it has not the certainty required at common law. Declaration of Rights, art. 12. *Commonwealth* v. *Davis*, 11 Pick. 432. *Commonwealth* v. *Phillips*, 16 Pick. 211.

2. By the statute creating the police court of Milford, the duties of clerk are expressly imposed upon the justice. *Sts.* 1854, *c.* 60, § 7; 1857, *c.* 264. The *St.* of 1838, *c.* 147, § 2, authorizing "the justice of any police court," except in Boston, to appoint a clerk, does not apply to police courts since created. *Commonwealth* v. *Brady*, 7 Gray, 320. In order to sustain this complaint, the court must not only hold that the justice could appoint a clerk, but must take notice that he had exercised that power, and had appointed Daggett.

J. H. Clifford, (Attorney General,) for the Commonwealth.

By the Court. 1. This complaint is in the form prescribed by *St.* 1855, *c.* 397, and sufficiently avers that the defendant kept the liquors with intent to sell them contrary to law, by alleging that the defendant was not authorized to sell them in this commonwealth for any purpose whatever under the statute of 1855, *c.* 215. This excludes any possible legal authority in the defendant to sell liquors in this commonwealth, inasmuch as any authority to sell liquors could be derived only from that statute.

2. The second section of *St.* 1838, *c.* 147, authorizing the justice of "any police court," except in Boston, to appoint a clerk, is a general provision, intended to enable the justices of such courts, then or thereafter to be established, to appoint a clerk whenever the amount of their business should require it

Exceptions overruled.

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Commonwealth *vs.* Dorace Young.

A mechanic receiving materials to be made into shoes at his own shop is not an agent or servant of the person furnishing the leather, within the meaning of the Rev. Sts. *c.* 126, § 29, against embezzlement.

Indictment for receiving and concealing leather and other stock for the construction of shoes, which belonged to Gay & Co., knowing them to have been embezzled by William Bowen.

At the trial in the court of common pleas at October term 1856 before *Mellen*, C. J., the district attorney introduced evidence tending to prove that said stock and materials "were taken out by Bowen to be made up into shoes, in a shop occupied by him, in the town of Douglas — Gay & Co. doing business in Oxford — and that Bowen, after taking said stock and materials to Douglas, caused them to be sent to Boston, and there sold the same." The defendant requested the court to rule that this evidence did not prove the offence of embezzling by Bowen. But the judge declined so to rule, and submitted the evidence to the jury, who returned a verdict of guilty. The defendant alleged exceptions.

H. Chapin, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Dewey, J. The inquiry is whether the provisions of the statute law of this commonwealth punishing embezzlement, as they existed at the time of the offence charged in this indictment, would embrace a case of conversion of property under circumstances like those of the present case. This must be decided by reference to the Rev. Sts. *c.* 126, § 29, as it was by that statute that embezzlement was made punishable as a criminal offence, and the parties liable to be punished for embezzlement are there particularly described. The *St.* of 1853, *c.* 184, further provided for the punishment of receivers and concealers of stolen and embezzled property, but did not enlarge the class of persons who might be punished as principals in embezzlement.

The Rev. Sts. *c.* 126, § 29, provide that "if any clerk, agent

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or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use any money or property of another, which shall have come to his possession, or shall be under his care, by virtue of such employment," he shall be deemed guilty of larceny. Was Bowen, in relation to the property committed to him to be made up into shoes, the agent or servant of Gay & Co.? In the opinion of the court no such relation existed between the parties as was contemplated by this statute. It was a case of a contract between them, by which Bowen stipulated to manufacture certain shoes for Gay & Co., the latter furnishing the leather for the same. Both were principals in the contract entered into. The language of the statute being such as to confine its provisions to those who stood in the relation of agent to a principal, we do not perceive how it can properly be considered as including the case of a mechanic or manufacturer to whom materials are sent for the purpose of being manufactured into articles for use. The acts of Bowen not constituting that embezzlement made punishable by the Rev. Sts. *c.* 126, § 29, the defendant Young is not punishable on an indictment against him for receiving and concealing the property thus placed in the hands of Bowen, knowing the same to have been embezzled by Bowen.

The recent *St.* of 1857, *c.* 233, on the subject of embezzlement, is more general, but its effect we have not considered, as the case before us arose under the prior statutes.

Exceptions sustained.

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COMMONWEALTH *vs.* FREDERICK T. HOLDER.

Stealing goods in another of the United States, formerly a colony of Great Britain, and bringing them into this commonwealth, may be punished as larceny here. THOMAS, J. dissenting.

INDICTMENT for stealing at Milford in this county goods of Henry W. Dana. At the trial in the court of common pleas there was evidence that the defendant broke and entered the shop of said Dana at Smithfield in the State of Rhode Island, and stole the goods mentioned in the indictment, and brought them into this county. The defendant asked that the jury might be instructed that the indictment could not be maintained, because the courts of this state could not take cognizance of a larceny committed in another state. But *Mellen*, C. J. refused so to instruct the jury, and instructed them that the evidence, if believed, was sufficient to support the indictment. The defendant, being convicted, alleged exceptions.

G. F. Verry, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

SHAW, C. J. A majority of the court are of opinion that this case must be considered as settled by the case of *Commonwealth* v. *Uprichard*, 3 Gray, 434, and the principles stated, and the precedents cited. Though to some extent these colonies before the Revolution were distinct governments, and might have different laws, it was not unreasonable, as they all derived their criminal jurisprudence from the English common law, to regard the rule applicable to a theft, in an English county, of goods carried by the thief into another, as analogous, and adopt it. We are of opinion that Massachusetts did adopt it, and this is established by judicial precedent, before and since the Revolution, and is now settled by authority as the law of this state.

THOMAS, J. The real question in this case is, whether the defendant can be indicted, convicted and punished in this commonwealth for a larceny committed in the State of Rhode Island. If it were a new question, it would be enough to state it. The obvious, the conclusive answer to the indictment would

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be, that the offence was committed within the jurisdiction of another, and, so far as this matter is concerned, independent state, of whose law only it was a violation, and of which its courts have exclusive cognizance. By the law of that state the offence is defined and its punishment measured. By the law which the defendant has violated he is to be tried. Whether the acts done by him constitute larceny, and, if so, of what degree, must be determined by that law. Its penalties only he has incurred. Its means of protection and deliverance he may justly invoke, and especially a trial by a jury of his peers in the vicinage where the offence was committed.

This obvious view of the question will be found upon reflection, I think, to be the only one consistent with the reasonable security of the subject or the well defined relations of the states. It is well known that the laws of the states upon the subject of larceny materially differ. In most of them the common law of larceny has been greatly modified by statutes. The jurisprudence of all is not even based on the common law. In several the civil law obtains.

In cases where a difference of law exists, by which law is the defendant to be judged; the law where the offence (if any) was committed, or where it is tried? For example, the defendant is charged with taking with felonious intent that which is parcel of the realty, as the gearing of a mill or fruit from a tree. By the St. of 1851, *c.* 151, the act is larceny in this commonwealth. If it appears that in the state where the act was done it was, as under the common law, but a trespass, which law has the defendant violated, and by which is he to be tried? Or suppose the defendant to be charged with the stealing of a slave — a felony in the state where the act is done, but an offence not known to our laws. The difficulty in both cases is the same. You have not only conflicting jurisdictions, but different rules of conduct and of judgment.

But supposing the definitions of the offence to be the same in the two states, the punishments may be very different. Where such difference exists, which penalty has the defendant justly incurred, and which is he to suffer? For example, the offence

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is punishable by imprisonment in Rhode Island, say for a year; in this state the same offence is punishable by imprisonment from one to five years; is the defendant liable to the heavier punishment? Or suppose he has been convicted in Rhode Island, and in consideration of his having indemnified the owner for the full value of the goods taken, his punishment has been more mercifully measured to him, can he, after he has suffered the punishment, and because the goods were, after the larceny, brought into this state, be made to suffer the penalty of our law for the same offence? Or suppose him to have been convicted in Rhode Island and a full pardon extended to him, can he be tried and convicted and punished here?

Again; the power to indict, convict and punish the offence in this state proceeds upon the ground that the original caption was felonious. If the original taking was innocent or but a trespass, the bringing into this state would not constitute a larceny. You must therefore look at the law of the state where the first caption was made. And how is the law of another state to be ascertained? What is the law of another state is a question of fact for the jury. The jury in this way are in a criminal case made not only to pass upon the law, but to pass upon it as a matter of evidence, subject, strictly speaking, neither to the direction nor the revision of the court.

Again; the defendant is indicted here for the larceny committed in Rhode Island; while in custody here awaiting his trial, he is demanded of the executive of this state by the executive of Rhode Island as a fugitive from the justice of that state, under the provisions of the Constitution of the United States, art. 4, § 2, and the U. S. St. of 1793, *c.* 45. Is he to be tried here, or surrendered up to the state where the offence was committed and tried there? Or if he has been already tried and convicted and punished in this state, is he to be sent back to Rhode Island to be tried and punished again for the same offence? And would his conviction and punishment here be any answer to the indictment there? Or if he has been fully tried and acquitted here and then demanded by the executive of Rhode Island, is he, upon requisition, to be sent to that state to be again tried, to

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be twice put in jeopardy for the same offence? It is quite plain no ground in law would exist for a refusal to surrender.

The defendant was indicted for larceny, not for the offence of bringing stolen goods into the Commonwealth. He was, under the instruction of the presiding judge, tried for the larceny in Rhode Island, was convicted for the larceny in Rhode Island, and must be punished, if at all, for the larceny in Rhode Island. And, under the rule given to the jury, is presented a case where, for one and the same moral act, for one and the same violation of the rights of property, the subject may be twice convicted and punished. Nay more, if a man had stolen a watch in Rhode Island and travelled with it into every state of the Union, he might, under the rule given to the jury, if his life endured so long, be indicted and punished in thirty two states for one and the same offence.

And it is well to observe that it is the retention of the property which is the cause of the new offence, and the carrying of it from the place of caption into another state. If the defendant had stolen property in Rhode Island, and consumed or destroyed it, and then had removed to Massachusetts, but one offence would have been committed, and that in Rhode Island.

Such are some of the more obvious difficulties attending the position that an offence committed in one state may be tried and punished in another. The doctrine violates the first and most elementary principles of government. No state or people can assume to punish a man for violating the laws of another state or people. The surrender of fugitives from justice, whether under the law of nations, treaties with foreign powers, or the provisions of the Constitution of the United States, proceeds upon the ground that the fugitive cannot be tried and punished by any other jurisdiction than the one whose laws have been violated. Even in cases of the invasion of one country by the subjects of another, it is the violation of its own laws of neutrality, that the latter country punishes, and not the violation of the laws of the country invaded. The exception of piracy is apparent rather than real. Piracy may be punished by all nations, because it is an offence against the law of nations upon the seas, which are the highways of nations.

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The ruling of the learned chief justice of the common pleas was, I may presume, based upon the decisions of this court in *Commonwealth* v. *Cullins*, 1 Mass. 116, and *Commonwealth* v. *Andrews*, 2 Mass. 14.

It is certainly the general duty of the court to adhere to the law as decided. Especially is this the case where a change in the decision would impair the tenure by which the rights and property of the subject are held. But even with respect to these, where it is clear a case has been decided against the well settled principles of law and of reason, it is the duty and the practice of the courts to revise such decision; and to replace the law on its old and solid foundation. This is peculiarly the duty of the courts where such decision works its injustice by impairing the personal rights of the citizen, or by subjecting him to burdens and penalties which he never justly incurred.

In my judgment, the courts of this commonwealth have not, and never had, under the Constitution of the United States or otherwise, the rightful power to try a man for an offence committed in another state. It is in vain, it seems to me, to attempt to preserve, and make rules of conduct, decisions founded upon wholly erroneous views of the relations which the states of the Union bear to each other under the Constitution, and in conflict with well settled principles of constitutional and international law.

I should be content to rest my dissent from the judgment of the court in the case at bar upon the principles affirmed in the recent case of *Commonwealth* v. *Uprichard*, 3 Gray, 434. In effect that case overrules, as its reasoning thoroughly undermines, the earlier cases. They cannot stand together.

But as the decision in the case at bar rests upon the authority of the cases in the first and second of Massachusetts Reports, it may be well to examine with care the grounds upon which they rest. Such an examination will show, I think, not only that the cases were put upon erroneous views as to the relation of the states, but that they were also unsound at common law.

In the case of *Commonwealth* v. *Cullins*, a jury trial where

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three judges of the court were present, the evidence showing that the goods were taken in the State of Rhode Island, Mr. Justice Sedgwick, who charged the jury, said that "the court were clearly of opinion that stealing goods in one state and conveying stolen goods into another state was similar to stealing goods in one county and conveying the stolen goods into another, which was always holden to be felony in both counties." Whatever the points of similarity, there was this obvious and vital difference, to wit, that conviction in one county was a bar to conviction in another, and that conviction in one state is no bar to conviction in another state.

It was a doctrine of the common law, that the asportation of stolen goods from one county to another was a new caption and felony in the second county; a legal fiction, devised for greater facility in convicting the offender where it was uncertain where the first caption took place. The foundation of the rule was that the possession of the owner continued, and that every moment's continuance of the trespass may constitute a caption as well as the first taking. But in what respect was the taking in one state and conveying into another state similar to the taking in one county and conveying into another county? It could only be "similar" because the legal relation which one state bears to another is similar to that which one county bears to another; because, under another name, there was the same thing. If a man is to be convicted of crime by analogy, the analogy certainly should be a close one. Here it was but a shadow. In the different counties there was one law, one mode of trial, the same interpretation of the law and the same punishment. The rule, mode of trial and jurisdiction were not changed.

The States of the Union, it is quite plain, hold no such relation to each other. As to their internal police, their law of crimes and punishments, they are wholly independent of each other, having no common law, and no common umpire. The provision, indeed, in the Constitution of the United States for surrendering up fugitives from justice by one state to another is a clear recognition of the independence of the states of each

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other in these regards. It excludes the idea of any jurisdiction in one state over crimes committed in another, and at the same time saves any necessity or reason for such jurisdiction. Nor is there any provision in the Constitution of the United States which impairs such independence, so far as the internal police of the states is concerned. On the other hand, the widest diversity exists in the institutions, the internal police and the criminal codes of the several states, some of them, as Louisiana and Texas, having, as the basis of their jurisprudence, the civil, and not the common law. In the relation which Louisiana holds to this state can any substantial analogy be found to that which Surrey bears to Middlesex?

An analogy closer and more direct could have been found in the books when *Commonwealth* v. *Cullins* was decided. It was that of Scotland to England, subject both to one crown and one legislature; yet it had been decided that when one stole goods in Scotland, and carried them to England, he could not be convicted in the latter country. *Rex* v. *Anderson*, (1763,) 2 East P. C. 772. 2 Russell on Crimes, (7th Amer. ed.) 119. Or an analogy might have been found in the cases of goods stolen on the high seas and brought into the counties of England, of which the courts of common law refused to take cognizance, because they were not felonies committed within their jurisdiction. 1 Hawk. *c.* 33, § 52. 3 Inst. 113. In these cases a test would have been found, applicable to the alleged larceny of Cullins, to wit, the offence was not committed in a place within the jurisdiction of the court, but in a place as foreign to their jurisdiction, so far as this subject matter was concerned, as England or the neighboring provinces. The case of *Commonwealth* v. *Cullins* has no solid principle to rest upon.

The case of *Commonwealth* v. *Andrews*, two years later, may be held to recognize the rule laid down in *Commonwealth* v. *Cullins*, though it was an indictment against Andrews as the receiver of goods stolen by one Tuttle in New Hampshire; and though there is, at the least, plausible ground for saying that there was a new taking by Tuttle at Harvard in the county where the defendant was indicted and tried. Indeed, Mr. Jus-

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tice Parker takes this precise ground; though he adds that "the common law doctrine respecting counties may well be extended by analogy to the case of states, united, as these are, under one general government." If that union was with reference to or concerned the internal police or criminal jurisprudence of the several states; if it was not obviously for other different, distinct and well defined purposes; and if we could admit the right of the court to extend by analogy the provisions of the criminal law and so to enlarge its jurisdiction; there would be force in the suggestion. As it is, we must be careful not to be misled by the errors of wise and good men.

Judge Thatcher puts the case wholly on the felonious taking at Harvard.

Mr. Justice Sedgwick, though having the same view as to the taking at Harvard, does not rest his opinion upon it, but upon the ground that the continuance of the trespass is as much a wrong as the first taking. This doctrine applies as well where the original caption was in a foreign country, as in another state of the Union. If you hold that every moment the thief holds the property he commits a new felony, you may multiply his offences *ad infinitum;* but in so carrying out what is at the best a legal fiction, you shock the common sense of men and their sense of justice. Mr. Justice Sedgwick will not admit the force of the objection that the thief would be thus twice punished, but regards with complacency such a result. But as we are to presume that the punishment is graduated to the offence, and, as far as punishment may, expiates the wrong, the mind shrinks from such a consequence. But saying that whatever he might think upon this question if it were *res integra*, he puts his decision upon the case of *Paul Lord* decided in 1792, and that of *Commonwealth* v. *Cullins*.

Chief Justice Dana relies upon the cases before stated and a general practice, and also upon the principle that every moment's felonious possession is a new caption.

Such was the condition of the law in this state when the case of *Commonwealth* v. *Uprichard* came before the court. In that case the original felonious taking was in the province of

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Nova Scotia. The bringing of the stolen goods into this commonwealth was held not to be a larceny here. But if it be true that every act of removal or change of possession is a new caption and asportation; that every moment's continuance of the trespass is a new taking; if this legal fiction has any life, it is difficult to see why the bringing of the goods within another jurisdiction was not a new offence. No distinction in principle exists between this case, and a felonious taking in another state and bringing into this. So far as the law of crimes and punishments is concerned, the states are as independent of each other as are the states and the British Provinces.

The case of *Commonwealth* v. *Uprichard* rests, I think immovably, upon the plain grounds that laws to punish crime are local and limited to the boundaries of the states which prescribe them; that the commission of a crime in another state or country is not a violation of our law, and does not subject the offender to any punishment prescribed by our law. These are principles of universal jurisprudence, and as sound as they are universal.

It is sometimes said that after all the offender is only tried and convicted for the offence against our laws. This clearly is not so. It is only by giving force to the law of the country of the original caption, that we can establish the larceny. It is the continuance of the caption felonious by the law of the place of caption. In the directions given to the jury such effect is given to the laws of Rhode Island. The jury were instructed that if the defendant broke and entered into the shop of Henry W. Dana in Smithfield in Rhode Island, and thence brought the goods into this county, the indictment could be maintained. The felonious taking in Rhode Island is the inception and groundwork of the offence. The proceeding is in substance and effect but a mode of enforcing the laws of and assuming jurisdiction over offences committed in another state.

For the reasons thus imperfectly stated, I am of opinion that the instructions of the court of common pleas were erroneous, that the exceptions should be sustained, the verdict set aside and a new trial granted.

Exceptions overruled.

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Harding P. Woods *vs.* Calvin Sanford.

Under the homestead act of 1855, *c.* 238, which provides that "no property by virtue of this act shall be exempted from levy for any debt contracted previous to the passage of this act," a debtor who becomes insolvent, owing debts contracted before the passage of the act to an amount exceeding the amount exempted for a homestead, must surrender his homestead to his assignee in insolvency.

Writ of entry to recover a tract of land in Barre with a dwelling-house thereon. The parties submitted the case to the decision of the court upon the following statement of facts:

On the 4th of March 1856 the tenant, being insolvent, applied for the benefit of the insolvent laws, and on the 17th of March his estate, including the demanded premises, was duly assigned by the commissioner of insolvency to the demandant. The tenant, then and still occupying the premises with his family, refused to yield possession thereof to the demandant, and claimed a right in them as his homestead under the St. of 1855, *c.* 238. The value of the dwelling-house is $3000, of other buildings on the land $1000, and of the land between $4000 and $5000. At the time of the passage of said statute the tenant had debts to the amount of $5000, secured by mortgage upon said land, which are still unpaid; and other debts to the amount of $1600, not secured in any way, which, together with other debts to a large amount, have been proved against his estate, and upon $950 of which suits had been brought and this land attached, which suits are still pending.

C. Brimblecom, for the demandant.

P. E. Aldrich, for the tenant. The tenant has a right to the homestead exemption, as against all his creditors whose claims have been created since the passage of the St. of 1855, *c.* 238. But if the homestead, by virtue of the assignment in insolvency, passed to the assignee, it would enure to the benefit of all the defendant's creditors, without distinction. *Norton* v. *Norton*, 5 Cush. 530. That would contravene the policy of the homestead act, which is, to secure a home to every family; and therefore the law will first appropriate other property belonging

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to a debtor for the payment of his debts, before taking his homestead; and if the other property is insufficient to pay all the debts, then preëxisting creditors, after taking their dividend with other creditors out of that property, may resort to the homestead for the payment of the balance due them.

This action cannot be maintained by the assignee; but the remedy, if any, should be in the name of one or more of the creditors whose debt existed at the time of the passage of the homestead act; and the court will in this case exercise its chancery powers under the *St.* of 1838, *c.* 163, § 18.

Bigelow, J. By *St.* 1855, *c.* 238, exempting from levy on execution the homestead of a householder to the value of eight hundred dollars, it is provided, in section third, that "no property by virtue of the act shall be exempted from levy for any debt contracted previous to the passage of this act." Under *St.* 1838, *c.* 163, § 5, an assignee in insolvency is entitled to "all property which might have been taken in execution" against the debtor. It is clear therefore that the demanded premises might have been taken in execution for debts contracted prior to the 27th of April 1855, when the homestead exemption act was passed. It appearing that such debts have been proved against the estate of the insolvent to an amount greater than the whole value of the homestead right of the debtor under *St.* 1855, *c* 238, it follows that the entire estate, being subject to levy on execution, vests in the demandant as assignee, who is entitled to recover it in this action.

The mode in which the assignee shall appropriate the proceeds of that part of the demanded premises, which was liable to levy on execution as to some of his creditors and exempt as to others, cannot be adjudicated in this action. The question will properly arise on the marshalling of the assets and must be then determined. *Judgment for the demandant.*

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JAMES M. WOODBURY *vs.* JOHN B. PROCTOR.

Upon a reference by rule of court, the award must be made by the arbitrators named in the rule; and even if the parties by writing indorsed on the rule substitute an arbitrator in place of one of those named, and waive all exceptions, no judgment can be rendered on the award.

APPEAL from the acceptance of an award by the court of common pleas, whose record showed the following facts:

The parties appeared and agreed to refer the action to the determination of Stephen Shepley, James B. Lane and Allen McLaughlin, the report of whom or a major part of whom being made as soon as might be, judgment thereon to be final, and execution issue accordingly. Afterwards the rule of reference was returned with an agreement and award indorsed thereon.

By that agreement, the parties substituted Rodney Wallace in place of Shepley, and agreed that the decision of Wallace, Lane and McLaughlin, or a major part of them, should be final and conclusive touching the matters submitted, and that judgment of court might be entered and execution issue thereon; and expressly waived any and all exceptions to the award of the said Wallace, Lane and McLaughlin, or a major part of them, upon the matters within submitted.

The award was signed by Wallace and Lane only, and was in these words: "All the referees appointed by the above rule of court notified and met the parties, and heard their several allegations, proofs and arguments, and duly considered the same; and the undersigned, being a major part of said referees, do award and determine that the abovenamed James M. Woodbury shall recover of the abovenamed John B. Proctor the sum of seventy dollars, together with the costs of court to be taxed by the court, and that the same be in full of all matters above referred to us."

N. Wood, for the plaintiff, cited *Merrill* v. *Gold*, 1 Cush. 457; *Day* v. *Berkshire Woollen Co.* 1 Gray, 420; *Walker* v. *Boston &*

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Maine Railroad, 3 Cush. 1; *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 91; *Simonds* v. *Parker*, 1 Met. 508; *Hallock* v. *Franklin*, 2 Met. 558; *Manlove* v. *Thrift*, 5 Munf. 493; *Lattimore* v. *Martin*, Addis. 11; *Browning* v. *McManus*, 1 Whart. 177

C. H. B. Snow, for the defendant.

Bigelow, J. The authority of referees to determine a cause pending in court, so that their award shall have the effect of a verdict and be the basis of a judgment, is derived not from the assent of the parties, but from the court by which they are appointed. The parties cannot, by their own act merely, empower persons in the country to make an award which shall be binding on the court where the action is pending. The submission under a rule of court takes force, effect and validity from the action of the court sanctioning the previous agreement of the parties. It becomes part of the record, and the case can be heard and tried only under the submission while it remains unrevoked. It is then binding on the court as well as the parties.

In the case at bar, the reference as originally constituted by the rule of court has never been changed on the record, and no persons but those there named had any jurisdiction of the case. There has therefore been no award under the rule. Only one of the arbitrators duly appointed has signed the award. The agreement of the parties, subsequent to the submission for the appointment of a new referee, must be treated as a nullity. If the parties can appoint one referee in place of one appointed by the court, they can in like manner appoint two or more, and thus make an entirely new arbitration without the authority or sanction of the court. But there is no warrant for any such proceeding. There are but two modes known to our law, in which an award can be made the basis of a final judgment between the parties as upon a verdict, without any new process. One is by a submission under the Rev. Sts. *c.* 114, before a justice of the peace, and the other is by reference of an action pending to arbitrators appointed by the court. *Commonwealth* v. *Pejepscut Proprietors*, 7 Mass. 414, 417. *Haskell* v. *Whitney*, 12 Mass. 50. *Foster* v. *Durant*, 2 Cush. 550.

Judgment reversed; award set aside.

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Henry Greenwood *vs.* Elisha Murdock.

A mortgage, to secure advances to enable the mortgagor to erect a building, of "all his right, title and interest which he now has in the foundation or stone work of said building, and which he may have in and unto said building during its erection and completion and after it is completed," passes the land on which the building stands.

Bill in equity to redeem about a quarter of an acre of land from a mortgage. The bill and answer exhibited the following case:

On the 21st of May 1850 the inhabitants of Winchendon demised said land to Harrison Harwood for nine hundred and ninety nine years, at an annual rent of one dollar, by a lease which provided for the erection of a large building, and prohibited the erection of any other on said land. On the same day Harwood mortgaged the land to Milton S. Morse to secure the payment of $1000; and on the 5th of the following August he executed an indenture, which, after reciting that Morse had advanced money and furnished materials and labor for the purpose of erecting said building, "witnesseth that the said Harwood, for the purpose of securing and indemnifying the said Morse, his heirs and assigns, for and on account of said advances, materials and labor, furnished as aforesaid, has granted, bargained, sold, remised and released, all his right, title and interest which he now has in the foundation or stone work of said building, and by these presents does hereby grant, sell, bargain, release and remise unto the said Morse, and his heirs and assigns, all his right, title and interest, which he may have in and unto said building during its erection and completion and after it is completed, as mentioned in said lease. Provided the said Morse shall continue to furnish money, materials and labor for its completion. To have and to hold said stone work, building and premises, hereby granted or mentioned, or intended so to be, with all the appurtenances thereunto belonging, unto the said Milton S. Morse, his heirs and assigns, to his and their use and behoof forever. Provided nevertheless, that if the said Har-

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wood, or his heirs, administrators and executors, shall well and truly pay unto the said Morse, or his heirs and assigns, the sum of money by the said Morse advanced and materials and labor furnished as aforesaid, in three equal annual payments," on days specified, "with interest thereon at eight per cent. until paid, then this present indenture and the estate hereby granted, as well as the recited obligation, shall cease, determine, and be absolutely void; otherwise, to remain in full force and virtue. Provided also, and it is further agreed, that, until default by the party of the first part to pay as aforesaid, he may remain in possession of the said premises, and use and enjoy the same, without molestation by the said Morse or his representatives."

The plaintiff claimed by subsequent conveyance from Harwood, and the defendant as assignee of Morse. The plaintiff offered to pay the amount secured by the mortgage of May. The defendant contended that he should also pay the amount advanced by Morse in money, labor and materials secured by the indenture made in August.

C. Devens, Jr., for the plaintiff, contended that the indenture passed only Harwood's then interest in the foundation and stone work of the building; and cited Com. Dig. Grant, D.; Co. Lit. 4 *b*, 5 *b*; 2 Story on Eq. § 1021; *Adams* v. *Frothingham*, 3 Mass. 352; *Jones* v. *Richardson*, 10 Met. 481; *Barnard* v. *Eaton*, 2 Cush. 303; *Doane* v. *Broad Street Association*, 6 Mass. 332; *Leonard* v. *White*, 7 Mass. 6; *Otis* v. *Smith*, 9 Pick. 293; *Allen* v. *Scott*, 21 Pick. 25; *Bacon* v. *Bowdoin*, 22 Pick. 401; *Bacon* v. *Bowdoin*, 2 Met. 598; *Atkins* v. *Bordman*, 2 Met. 471; *Ashby* v. *Eastern Railroad*, 5 Met. 368; *Cheshire* v. *Shutesbury*, 7 Met. 566; *Forbush* v. *Lombard*, 13 Met. 109; *Blake* v. *Clark*, 6 Greenl. 436; *Doe* v. *Burt*, 1 T. R. 701.

N. Wood, for the defendant, cited some of the same cases, and also *Glover* v. *Austin*, 6 Pick. 220; *Winslow* v. *Merchants' Ins. Co.* 4 Met. 306; *Butler* v. *Page*, 7 Met. 40; *Lewis* v. *Lyman*, 22 Pick. 437; Com. Dig. Grant, E. 11; 3 Dane Ab. 107; *LeRoy* v. *Platt*, 4 Paige, 77; *Swartz* v. *Swartz*, 4 Barr, 353; *Doe* v. *Wheeler*, 6 Ired. 196; *Webb* v. *Patterson*, 7 Humph. 431

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BIGELOW, J. The estate demised to Harwood by the inhabitants of Winchendon for the term of nine hundred and ninety nine years is in these proceedings to be treated as an estate in fee simple, by virtue of the Rev. Sts. *c.* 60, § 18, which provide that leasehold estates demised for one hundred years or more, so long as fifty years of the term remain unexpired, shall be regarded as an estate in fee simple, "as to everything concerning the redemption thereof when mortgaged."

The only question raised by the plaintiff is, whether the defendant acquired any interest in the land by virtue of the indenture of mortgage of August 5th 1850, between Harwood and Morse, which has been assigned to the defendant, or whether it was a conveyance only of the materials used in the construction of the building.

It seems to us that the terms of the grant bring it within the numerous cases in which it has been decided that land will pass by a deed which does not contain any description of the land, but which grants only the structure which is erected upon it; so that a grant of a barn, a shop, a house, a well, a mill, will convey a title to the land under it and necessary to its enjoyment and use. *Cheshire* v. *Shutesbury*, 7 Met. 566. *Forbush* v. *Lombard*, 13 Met. 109. *Johnson* v. *Rayner*, 6 Gray, 110.

In the present case the grant is of all the right, title and interest which the grantor now has in the foundation or stone work of the building, and also of all the "right, title and interest" which the grantor "may have in and unto said building during its erection and completion, and after it is completed, as mentioned in said lease." Now the right which the grantor had in said foundation, stone work and building, under the lease, was not merely or mostly a right to the materials of which they were composed, but the more valuable right of having them on the premises as part of a structure, with a right to use and occupy them for a long period of time. It was a grant therefore of his right to the use and occupation of the land, as well as of the building or of the portion of it then erected.

Such we think was clearly the intent of the parties. It is

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not reasonable to suppose that the grantee, when advancing money to complete the building, would take, as security for his advances, a mortgage on the materials only, which were to become part of the realty, and which, by the terms of the lease, when annexed to the freehold, he would have no right to remove or in any way render available as security for his loan.

We are therefore of opinion that the respondent has a right to receive from the plaintiff for the redemption of the premises the advances made under said indenture, and the case must go to a master to determine the amount.

Kassimir Vogel *vs.* People's Mutual Fire Insurance Company.

To a declaration averring a waiver of a bar from lapse of time, a denial of such waiver is a sufficient answer, without more distinctly setting up the bar.

An applicant for insurance on personal property, who has made, but not delivered, a bill of sale thereof, taking in return only a promissory note secured by mortgage thereon, may truly represent and warrant himself to be the owner thereof.

A policy of insurance on the machinery in a silk factory, which provides that it shall be of no effect while the premises shall be used for storing "cotton in bales," "rags," or "wool," or for a "cotton mill," "woollen mill," or other "manufacturing establishment or trade requiring the use of heat," is not avoided by using one room for weaving a few pieces of stuff from woollen and linen thread and cotton, spun elsewhere and kept in the room.

Action of contract upon a policy of insurance for one year from the 17th of August 1854 on the machinery in the plaintiff's silk factory. Trial before *Bigelow*, J., who made the following report thereof:

The building and machinery were destroyed by fire on the 22d of August 1854, and this action was commenced on the 24th of April 1855. The conditions of insurance, which were made part of the policy, provided that no action against the company should be sustainable on the policy, unless commenced within four months after any loss. The declaration averred that the defendants had waived this condition. The an-

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swer denied such waiver, but did not set up the condition as a distinct ground of defence; and the plaintiff therefore contended that it could not be relied on as a bar to the action. But the judge ruled that this defence was open, and that the action was barred unless a waiver was shown.

The plaintiff in his application, which was expressly "made a part and portion of this policy and warranty on the part of the assured," stated that he was the owner of the property. The defendants denied the truth of this statement. It appeared that the plaintiff, before the making of the policy, and to prevent the machinery from being attached by his creditors, made a bill of sale thereof, which was never delivered, and received no consideration therefor, except a promissory note for $1800, and a mortgage to secure the same, which he still held; and that the bill of sale and mortgage were recorded in the town clerk's office. The judge ruled that this evidence did not maintain this defence.

On the face of the policy was the following clause: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall, at any time after the making, and during the continuance of this insurance, be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation, denominated hazardous or extrahazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods or merchandise, in the same terms and conditions denominated hazardous or extrahazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or indorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these presents shall cease, and be of no force or effect." In the "classes of hazards" annexed to the policy, "cotton in bales," "household furniture," "rags" and "wool" were specified as "hazardous;" "rag stores" and "upholstery manufacturers" as

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"extrahazardous;" and in the "memorandum of special hazards," "cotton mills," "metal and other mills of all kinds," "woollen mills, and generally all manufacturing establishments and all trades requiring the use of fire heat, not before enumerated."

The defendants introduced evidence that the building was occupied by the plaintiff as a silk factory, except one room about thirty feet square in the lower story, which was occupied by Daniel Humphrey for the purpose of weaving carpets and pantaloon stuff; that at the time of the fire and for a month previous, Humphrey worked there and employed two or three hands to work there besides himself; that there were two looms for weaving in the room, one for carpets and one for pantaloon stuff, both of which were made of woollen and linen thread, spun elsewhere and brought there to be woven, and kept in said room; that before the fire three pieces of carpeting, containing fifty or sixty yards each, and seven pieces of pantaloon stuff, had been made there; that during most of the time that Humphrey had been in the occupation of said room he had been trying experiments in weaving, and had made many alterations from time to time in his looms in order to try such experiments; that some cotton was kept in the rooms and used in the manufacture of carpets and pantaloon stuff; and that Humphrey had no lease of the room, nor was there any agreement for a specified rent, but he was to pay the plaintiff for the use and occupation of it what he thought fair. Upon this evidence the judge ruled that the plaintiff could not recover, and directed a nonsuit, subject to the opinion of the whole court.

C. Devens, Jr. & G. F. Hoar, for the plaintiff, to the point of Humphrey's use of the room, cited *Rice* v. *Tower*, 1 Gray, 426 *Boardman* v. *Merrimack Mutual Fire Ins. Co.* 8 Cush. 583; *Child* v. *Sun Mutual Ins. Co.* 3 Sandf. 26; *Percival* v. *Maine M. M. Ins. Co.* 33 Maine, 242; *Richards* v. *Protection Ins. Co.* 30 Maine, 280; *Shaw* v. *Robberds*, 6 Ad. & El. 75.

H. Chapin, for the defendants, to the same point, cited *Lee* v. *Howard Fire Ins. Co.* 3 Gray, 592; *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.* 8 Met. 120.

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BIGELOW, J. 1. The plaintiff by his declaration dispensed with any averment in the answer that the action was barred by lapse of time. The allegation of a waiver of such bar by necessary implication admitted its existence, and put the issue solely on the question of waiver. It was sufficient therefore for the defendant to meet the issue thus tendered him by the plaintiff by denying in clear and distinct terms that any such waiver had been made.

2. The facts relied on to show that the plaintiff was not the owner of the property insured at the time of making application for the policy, and that his statements in this particular were false, do not sustain this ground of defence. The bill of sale was without consideration and had never been delivered, nor had the property, either actually or constructively, ever passed out of the plaintiff's possession. It is clear that as between vendor and vendee there had been no such delivery as to pass the property; *a fortiori*, there was none to change the title as respects third parties.

3. The remaining ground of defence, that the policy was void because the premises had been used for purposes "denominated hazardous, extrahazardous, or included in the memorandum of special hazards, and not specified in the policy," is not sustained by the proof. It does not appear that the use of a single room in the building in the manner proved at the trial comes within any of the prohibited hazards which cannot be incurred without special leave. The premises were not used as a "cotton mill," "woollen mill" or a "manufacturing establishment requiring the use of heat," nor for "storing cotton in bales" or "wool." These are the only occupations enumerated among those which are called hazardous, extrahazardous or specially hazardous, which in any aspect of the proof could be said to resemble those which were carried on in the premises insured; but the evidence falls short of proving that the building was actually used during the existence of the policy for any of them.

New trial ordered.

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City of Worcester *vs.* Worcester Mutual Fire Insurance Company.

An application by a town for insurance on a school-house stated, in answer to an interrogatory, that the ashes were taken up in metallic vessels which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults; and concluded with a memorandum that "if ashes are allowed to remain in wood, the insurers will not assume the risk;" and was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground, at a distance from the building; but the boy employed by the school committee to take charge of the building, for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school-house. *Held*, that the insurers were discharged.

Action of contract on a policy of insurance, dated February 10th 1855, upon a school-house against loss by fire, "according to the true intent and meaning of" the rules annexed to the policy, and the application for insurance, which was made part of the contract.

By those rules "policies shall become void and of no effect for any of the following causes or reasons, to wit:

"If the application shall not contain a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured, and material to the risk.

"Or if the assured shall withhold or conceal any such material facts or circumstances within his knowledge.

"Or if the state of things in or about buildings insured be so altered or changed by the advice, consent or procurement of the assured, as to cause a material increase of the risk.

"Or if a loss shall happen through the gross, wanton or wilful misconduct of the assured, or through his gross or culpable negligence, or by means of his intoxication."

The twelfth interrogatory in the application was this: "Are your ashes taken up in metallic vessels which are not allowed to stand on wood with ashes in them? And if deposited in or near the building in vaults of brick or stone?" The answer to both these questions was in the affirmative.

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At the end of the application, immediately above the signature, was the following: "NOTE. If ashes are allowed to remain in wood, or if fireplaces where stoves are substituted are not well secured by incombustible materials, and the wood where stove pipe is carried near to it is not thoroughly protected, the company will not assume the risk."

The parties admitted the execution of the policy and application; the destruction of the school-house by fire on the 12th of January 1856; and the right of the plaintiffs to recover, unless the following facts, with such inferences as might be drawn therefrom, constituted a defence.

"About six weeks before the destruction of the building a school was opened therein, and kept until the building was destroyed. A boy was hired to make the fires and take charge of the school-house during the continuance of the school; but no directions were given him by any one as to the disposition of the ashes. For almost three weeks from the opening of the school he threw them into a pile on the ground a rod or more from the building: but two or three weeks before the burning of the building a legal voter of the district in which the school-house was situated placed a wooden barrel in the wood-house which adjoined the school-house, and in which the wood for fuel was kept, and agreed with the boy to pay him a stipulated price if he would put the ashes, as they accumulated, in the barrel, which the boy from that time did, until the building was destroyed. There were no vaults of brick or stone or other incombustible material in or about the school-house, or provided elsewhere for the deposit of the ashes. The wood-house was a building of wood, and it was in flames when the fire was first discovered, and before it had reached the school-house.

"The prudential committee of the district at the time of the destruction of the school-house, who had held the same office in the previous year, soon after the school for the winter of 1854–55 was opened directed the person who then made the fires to throw the ashes upon the ground on the spot before referred to, and his directions were complied with during that winter."

C. Devens, Jr. (*G. F. Hoar* with him,) for the plaintiffs. The

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depositing of the ashes at a safe distance from the building on the ground was, while it continued, a substantial compliance with the contract. *Houghton* v. *Manufacturers' Mutual Ins. Co.* 8 Met. 114. *Underhill* v. *Agawam Mutual Fire Ins. Co.* 6 Cush. 440 The plaintiffs' designation of this spot for the purpose was manifestly known to the boy who afterwards had charge of the fires. His acts in delivering the ashes to a stranger by placing them in a receptacle provided by him, and the keeping of such receptacle in dangerous proximity to the building by such stranger, without right and in violation of the known rules of the plaintiffs, cannot constitute a defence. The warranty can be held to extend only to matters within the knowledge and control of the insured. This is put beyond dispute by the note at the end of the application, which limits the exemption of the insurers from liability to the single contingency "if ashes are allowed to remain in wood."

C. Allen, for the defendants.

DEWEY, J.* The answers and stipulations contained in the application of the plaintiffs for their policy are made an essential part of the contract between these parties. To the twelfth interrogatory, the plaintiffs by their answer had stated that "their ashes were taken up in metallic vessels, which were not allowed to stand on wood with ashes in them; and that, if deposited in or near the building, they were deposited in vaults of brick or stone." Upon the face of the application, and above the signature of the defendants to the application, was the following, "If ashes are allowed to remain in wood, the company will not assume the risk." This policy was therefore directly affected by the manner in which the plaintiffs used the insured property in reference to the stipulations above referred to. It is conceded that the plaintiffs had no vaults of brick or stone for the deposit of ashes. Had they had such, and had the usual course been to deposit their ashes therein, an unauthorized departure in one or two instances by their servant might not have affected the policy. But under the circumstances of the present case,

* THOMAS, J. did not sit in this case.

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placing the ashes for a period of two or three weeks continuously, and up to the time of the loss by fire, in a wooden barrel in the wood-house, which adjoined the school-house, and in which the fuel for the school-house was kept, by the agent employed by the defendants to make the fires and take charge of the school-house, was in direct violation of the terms of the contract for insurance, and must preclude the plaintiffs from recovering for the loss which has occurred.

Judgment for the defendants.

BENJAMIN N. BULLOCK *vs.* SUMNER P. LINDSAY.

In an action for a malicious prosecution against the plaintiff for assaulting the defendant with a knife, the defendant cannot introduce evidence that before the alleged assault the defendant had been informed that the plaintiff had carried dangerous weapons and had been prosecuted therefor; or that the defendant before the affray in which the assault was pretended to have been committed saw the plaintiff lurking about his barn.

ACTION OF TORT for a malicious prosecution by making a complaint against the plaintiff for an assault upon the defendant with a knife with intent to kill, upon which the plaintiff was bound over; but the grand jury found no bill against him. Answer, that the complaint was not made maliciously, nor without probable cause. Trial before *Bigelow*, J., who made a report to the full court, the material parts of which were as follows:

"The plaintiff and defendant both testified in the case. The evidence on the part of the defendant tended to show that on the evening of the day alleged in the complaint there was an affray between him and the plaintiff; and the defendant testified that the plaintiff had in his hand during the affray a knife, and that the plaintiff assaulted him and cut him with the knife upon the hand. The knife alleged to have been used was a pocket knife with a spring back, sometimes called a carpenter's knife. There was evidence in the case which tended to cor

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roborate the evidence of the defendant as to the assault upon him with this knife.

"The defendant offered evidence to prove that prior to this alleged assault he had been informed by third persons that the plaintiff carried about with him dangerous weapons; and that a year previous he had been informed and knew that a prosecution had been commenced against the plaintiff for carrying concealed and dangerous weapons. This evidence was rejected.

"It appeared in evidence on the part of the plaintiff that the defendant on the night of the affray first accosted the plaintiff, and demanded to know why he (the plaintiff) was 'lurking' round his premises, and said he did not want people 'lurking' round there. The defendant testified that he did make an inquiry of the plaintiff as to why he was 'lurking' about the premises. The defendant proposed to prove that the plaintiff had, in fact, previous to this time, 'lurked' about the barn of the defendant. This evidence was rejected.

"If either of these rulings was erroneous, a new trial is to be had, otherwise judgment is to be rendered on the verdict, which was for the plaintiff."

F. H. Dewey, for the defendant. 1. The evidence that the defendant had been informed that the plaintiff carried dangerous weapons, and knew that he had been prosecuted therefor, had a direct tendency to show that the defendant on reasonable grounds believed that the intention of the plaintiff was as charged in the complaint, and that the plaintiff's character was that of a quarrelsome and dangerous man. It should therefore have been admitted. *Bacon* v. *Towne*, 4 Cush. 239, 240. *Smith* v. *Hyndman*, 10 Cush. 556.

2. The evidence that the plaintiff had previously lurked about the defendant's barn was admissible to show that the defendant had reasonable cause to suspect that the plaintiff had an intention to injure him in some way.

C. Devens, Jr. & E. B. Stoddard, for the plaintiff, cited *Stone* v. *Crocker*, 24 Pick. 87; *Bacon* v. *Towne*, 4 Cush. 217; *Smith* v. *Hyndman*, 10 Cush. 554; *Tillotson* v. *Warner*, 3 Gray, 574; 2 Greenl. Ev. § 458; *Rodriguez* v. *Tadmire*, 2 Esp. R. 721; *Newsam* v. *Carr*, 2 Stark. R. 69.

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By the Court. Judgment must be rendered on this verdict. No evidence was excluded, which tended to show that the plaintiff had committed an assault upon the defendant, or that the defendant had probable cause to believe that such an assault had been committed upon him. Evidence that the defendant had been informed that the plaintiff had carried dangerous weapons, and been prosecuted therefor, had no tendency to show that he had probable cause for believing that the plaintiff had committed an assault upon him. The evidence subsequently offered was entirely irrelevant.

Judgment on the verdict.

Samuel Jennison *vs.* City of Roxbury.

If money paid by the Commonwealth for the support of a lunatic at the State lunatic hospital, on the mistaken supposition that he had no settlement within the Commonwealth, is retained by the Commonwealth, on discovery of the mistake, out of money due to the hospital, the treasurer of the hospital may recover, under Rev. Sts. c. 48, § 9, and *St.* 1837, c. 228, § 7, from the town in which the lunatic resided at the time of his commitment, unless the defendant proves that he had no settlement in the Commonwealth, for such support during the six years previous to the commencement of the action, and for that only.

When a statute requires a demand to be made in writing on the mayor and aldermen of a city thirty days before the commencement of a suit, an agreement in a case stated, that a demand was made on the city, will be understood to be such a demand as is required by the statute.

Action of contract by the treasurer of the State lunatic hospital at Worcester to recover for the support of Walter Rowe, a lunatic. Writ dated December 15th 1855. The parties stated the following case:

Rowe was committed to the hospital from the city of Roxbury, by the judge of probate, on the 1st of November 1848; and from that time until 1854, upon the supposition that he had no settlement within the Commonwealth, his support was charged to and paid for by the State. In 1854, the State having been informed that Rowe was a native of the Common-

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wealth, retained the amount previously so paid for his support, out of money then due the hospital. The plaintiff, before bringing this suit, demanded of the city of Roxbury the amount thus retained. If the plaintiff was entitled to maintain his action he shall have judgment for such sum as the court shall direct, with interest from the date of the writ; otherwise, a nonsuit shall be entered.

P. E. Aldrich, for the plaintiff.

H. C. Hutchins, for the defendants.

METCALF, J. On these agreed facts the court are of opinion that the plaintiff is entitled to judgment. By the Rev. Sts. *c.* 48, § 9, and *St.* 1837, *c.* 228, § 7, the treasurer of the lunatic hospital at Worcester may recover of the town or city, in which a lunatic resided at the time of his commitment to the hospital, the expenses of his support there, if he has no settlement within the Commonwealth, and if such town or city, for the space of thirty days after written demand of payment, made by the treasurer on the town or city officers, shall neglect or refuse to pay for such support. And the latter statute (1837, *c.* 228,) imposes on a town or city, when sued by the treasurer, the burden of showing that the lunatic has no settlement within the Commonwealth. This is not shown by the defendants in the present case. But the agreed facts do show that Rowe, the lunatic, resided in Roxbury at the time of his commitment to the hospital, and that the treasurer, before commencing this action, made a written demand on the defendants to pay for Rowe's support. And upon this statement of facts submitted to us, we must understand that the demand was made on the proper officers of the city of Roxbury, and that it was made thirty days at least before this suit was instituted; in other words, that the demand was made according to law. The defendants are therefore liable in this action, unless the payment to the hospital, by the Commonwealth, of the claim now in suit, on the supposition that Rowe had no settlement in Massachusetts, furnishes a defence. But it does not. The Commonwealth demanded and received back (in legal effect) the sum so paid from its treasury, on the alleged ground that it had been

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paid under a mistake of facts; thereby leaving the hospital to the same remedy which it had before the payment was made, and leaving also to the defendants the same defence which they would have had if they had been sued by the treasurer in the first instance. That defence, and the only defence, would have been that Rowe had no settlement in this state, but was a state pauper. And the burden of showing this would have been, as it now is, on the defendants.

The question then is, how much shall the plaintiff recover? The parties have agreed that if he can maintain this action, he shall have judgment for such an amount as the court shall direct, with interest from the date of the writ. By the Rev. Sts. c. 48, § 9, the plaintiff would have interest from the time of demand made on the defendants for payment, but he may relinquish a part or the whole of the interest.

The claim in this case is within the six years' statute limitation of actions. And we are of opinion that the defendants are entitled, on these agreed facts, to the benefit of that limitation. The plaintiff will therefore have judgment for so much of the claim as was within the six years, with interest, as by agreement, from the date of his writ.

ELIJAH PRATT & others *vs.* JOHN JEWETT & others.

It is no ground for dissolving a manufacturing corporation, on petition of a majority in number of the stockholders, owning a minority of the stock, that one owner of the majority of the stock has for many years controlled the election of officers and elected himself agent and clerk; that he has for a long time managed the business "according to his own will and choice, regardless of the wishes and interests of the petitioners;" that according to his statement the corporation has been doing a losing business for many years; that he has refused to make any change in the business, or to purchase the shares of the petitioners; and that if the business were skilfully and properly managed it might be made a source of profit to all concerned.

PETITION under St. 1852, c. 55, for the dissolution of the Tufts Manufacturing Company, a corporation established at

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Dudley by St. 1826, c. 108. The petitioners represent that they are a majority of the members of said corporation, and desire that its concerns may be closed; "that the whole number of shares of the capital stock of said corporation is twenty six; that of this number twenty shares are held and owned by John Jewett of said Dudley; that said Jewett for a number of years past has controlled the election of officers of the corporation when any election has been held; that at said elections said Jewett has uniformly elected himself agent and clerk of said corporation; that he has for a long time managed the affairs of said corporation according to his own will and choice, regardless of the wishes and interests of the other stockholders; that, according to his statement, for a number of years past the corporation has been doing a losing business; that said Jewett has refused to make any change in the business of the corporation, or to purchase the shares of the subscribers; that if the affairs of said corporation were skilfully and properly managed, it might be made a source of profit to all concerned, while now, whatever may be the case with said Jewett, the course which has been pursued by him for a number of years past is deeply injurious to the interests of the subscribers."

The Tufts Manufacturing Company and Jewett demurred to the petition, because it showed no case which entitled the petitioners to relief.

H. Chapin, for the petitioners, was first called on.

P. C. Bacon, for the respondents, was stopped by the court.

Shaw, C. J. The interests of all the members of a corporation ought to be identical. If these petitioners mean to say that Jewett manages the business against the interests of the corporation, and for his own interest, that would be a fraud, which must be fully set out. His refusal to purchase the shares of the petitioners may have been because they hold them too high. It is not necessary to discuss the limits of the power of this court to dissolve a corporation, which is a very useful and valuable power in many cases. The court are all clearly of opinion that no sufficient reasons are shown for exercising the power in this case. Jewett, owning more than two thirds of

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the stock, is entitled to the control. The true misfortune of the petitioners seems to be that they are in the minority, and cannot control the majority — the majority in stock vote. They say it has been a losing business; that is true of many other manufacturing corporations. In their judgment it could be managed more profitably; but they have not set out in what particulars Jewett's plan is wrong or theirs would be better. There is nothing in this petition to show anything illegal or fraudulent on the part of the respondents.

Petition dismissed.

ALVIRA G. SMITH *vs.* HORATIO SLOCOMB.

A conveyance of land, "beginning at an angle in the stone wall on the easterly side of the aforesaid road;" thence running around the rear of the lot granted "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first mentioned bound;" excludes the road.

ACTION OF TORT for breaking and entering the plaintiff's close. At the trial in the court of common pleas the plaintiff gave in evidence a deed from the defendant to herself of "a certain tract of land, situate in the easterly part of Sutton, on the easterly side of the road leading from Samuel Bigelow's to said Horatio Slocomb's, and is estimated to contain two acres and twelve rods, bounded as follows: beginning at an angle in the stone wall on the easterly side of the aforesaid road and on the line of the said Bigelow's land; thence running north 87° east on the line of land of said Bigelow and of Horace Leland twenty two rods to a stake and stones; thence south 11° west on the grantor's other land sixteen rods and twenty two links to a stake and stones; thence south 85° west on the grantor's other land twenty rods and two links to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first mentioned bound."

The plaintiff contended that by virtue of this deed her land

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extended to the centre of the road; and introduced proof of her possession of a portion of such land, on which it was admitted that the alleged trespasses occurred.

The defendant introduced evidence tending to prove that the length of lines as expressed in the deed would terminate at the bounds mentioned in said deed; and contended that the plaintiff's deed only carried her on the road to the stakes and stones at the southwest corner, and the angle in the wall at the northwest corner, and did not include any portion of the road.

But *Aiken*, J. ruled that by virtue of said deed the plaintiff's land extended to the centre of the road, and a verdict was taken for the plaintiff. The defendant alleged exceptions.

H. Chapin & C. E. Pratt, for the defendant.

F. H. Dewey, for the plaintiff, cited *Newhall* v. *Ireson*, 8 Cush. 595; *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 492; *Knight* v. *Wilder*, 2 Cush. 199; 3 Kent Com. (6th ed.) 432.

Shaw, C. J. The question is whether the plaintiff's deed conveyed the land to the centre, or only to the easterly side, of the road. Courses and distances are but circumstances, and in general must yield to monuments and abuttals. The theory of the law in this respect, as held in this commonwealth, is, that by taking land for a highway the public take an easement only, and not a fee; that the fee must be in somebody, and not in abeyance, and remains in the abutter; that the public easement so completely takes all that can be made serviceable to the owner, that what remains cannot be considered of much value; and therefore, if he makes a new conveyance bounding "on the road," and says nothing more, the presumption is, in the absence of all other proof, that the grantee takes *ad filum viæ*. The road is an abuttal, not a monument; and if the deed does not say on what side, it shall be taken to mean the centre.

But if the party chooses to retain his remnant — his fee in the soil under the road — he may do so. He may bound by the wall on one side of the road, or by the line between the land and the highway. If by a careful examination of the description, such is seen to have been his intention, it must be carried into effect.

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In *Newhall* v. *Ireson*, 8 Cush. 595, the court held, that under the rule of construction which gives greater effect to monuments and abuttals than to courses and distances, a boundary "to the road" and "on the road" extended to the middle of the road.

But here the description of the boundaries begins "at an angle in the stone wall on the easterly side of the aforesaid road," which is a point in the wall, not in the middle of the road. Thus commencing at the side of the road, it goes around the rear of the lot, and comes back to the road, "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first mentioned bound." Had it been merely "at the road" at both ends of the description, there would have been more ground for holding that it went to the middle. But when it starts at the side of the road, and comes back to the road, and thence on the line of the road to the point of beginning, the conclusion is inevitable that the road is excluded. The court are all of opinion that the description by its terms clearly excludes the highway, and thus overrides the presumption that a grant goes *ad filum viæ*. *Exceptions sustained.*

JOSEPH GOODRICH *vs.* INHABITANTS OF LUNENBURG.

Under the Rev. Sts. c. 7, § 27, one sixth of a state tax must be assessed on polls, although, if added to the town and county tax, it brings the poll tax on each individual above one dollar and a half. And if the tax is not so assessed, the whole assessment is void.

THOMAS, J. This is an action of contract to recover the amount of a tax assessed upon the plaintiff in the defendant town for the year 1855: the tax having been paid by the plaintiff after seizure of his property. The case is before us upon an agreed statement of facts.

The plaintiff says the tax was illegally assessed, because one sixth part of the sum to be raised was not assessed upon the polls. Upon this point the agreed facts are as follows:

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"The taxes for the year 1855 for the town of Lunenburg were

State tax	$495.00
County tax	662.08
Town grant	3130.00
Overlayings	84.92
	$4372.00
Highway deficiencies	40.92
	$4412.92

"Valuation of real and personal estate $672,351.

"Number of polls 306; poll tax $1.50.

"One sixth part of the tax might have conveniently been assessed upon the polls without assessing more than $1.50 upon a poll for town and county purposes." This was not done.

Two questions then arise: first, whether, and under what state of facts, the law requires that one sixth part of the whole sum to be raised shall be assessed upon the polls; and the second is, whether the omission so to assess makes the assessment void.

1. Upon the first point the language of the statute is plain. "The assessors shall assess upon the polls, as nearly as the same can be conveniently done, one sixth part of the whole sum to be raised; provided the whole poll tax, assessed in any one year, upon any individual, for town and county purposes, except highway taxes, shall not exceed one dollar and fifty cents; and the residue of said whole sum to be raised shall be apportioned upon property, in the manner provided in this chapter." Rev. Sts. c. 7, § 27.

These provisions are simple and explicit. One sixth part of the whole tax, as nearly as can conveniently be done, is to be assessed upon the polls; the residue, or five sixths, upon property. This is the rule for the distribution or apportionment of the burden of taxation. To this general rule there are two exceptions. The first has reference wholly to the facility of making the assessment, the avoiding of fractions and of the minute division of small sums, and is found in the words "as nearly as the same can be conveniently done."

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The other exception relates to certain well known purposes of taxation, and limits the amount to be assessed in one year upon a poll for those purposes: "Provided the whole poll tax, assessed in any one year, upon any individual, *for town and county purposes*, except highway taxes, shall not exceed one dollar and fifty cents." Out of this exception of town and county purposes are excepted highway taxes. The rule of assessment is this: the polls shall bear one sixth of the burden of taxation; the property, five sixths. But if the assessors find that one sixth of the taxes raised for town and county purposes, after deducting highway taxes, being assessed upon the polls, would exceed one dollar and fifty cents for a poll, such excess must be put upon property.

But there are other well known taxes than those raised for town and county purposes, as the school district and state tax, with respect to which no such limitation or restriction exists. That is to say, the general rule exists, requiring one sixth to be assessed upon the polls, as nearly as can conveniently be done; but there is no limitation restricting the amount to be assessed upon a poll to one dollar and fifty cents.

With respect to a school district tax, it has been decided by this court, that the restriction does not exist. The case arose in this county in 1833. By the *St.* of 1826, *c.* 143, § 11, moneys voted to be raised by school districts were to be assessed in the same manner as town taxes were assessed. The tax act then in force, the *St.* of 1828, *c.* 143, § 3, contained the same rule and the same restriction as to the assessment upon polls, which are found in the Rev. Sts. *c.* 7, § 27. The court held, that the restriction as to the amount of the poll tax did not extend to school district taxes, but applied in terms to taxes levied for town and county purposes. The poll tax for the school district was one dollar and eighty seven cents; and the court held it to be legal. *Taft* v. *Wood*, 14 Pick. 362.

In the case at bar, there was a state tax to be assessed of $495. One sixth part of it could have been conveniently assessed upon the polls without assessing more than a dollar and fifty cents upon a poll "for town and county purposes." State taxes are

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to be assessed according to the rules prescribed in the twenty-seventh chapter of the revised statutes. Rev. Sts. *c.* 7, § 16. One sixth part of the tax is to be assessed upon the polls. No part of it was so assessed. This omission was not only a violation of the letter of the statute, but of the principle by which the legislature have distributed and apportioned the burden of taxation. By the rule adopted by the assessors, no portion of the state tax would fall upon the polls, but the whole be borne by property.

It is true that under § 25 of *c.* 7 of the revised statutes, the assessors may include in the same assessment their state, county and town taxes, or any two of them, when they may think it convenient. But this power, given for the convenience of the assessors, does not, it is plain, change the principles by which the taxes are to be apportioned. Otherwise, the question whether any part of the burden of state taxation was to be borne by the polls would depend upon the discretion of the assessors of each town or city, and there would be no uniform rule upon the subject.

We are of opinion therefore that this tax was illegally assessed; and that one sixth of the state tax should have been distributed among the polls, although the effect would have been that the whole poll tax for state, county and town purposes would have exceeded one dollar and fifty cents.

2. The second question is, whether this mode of assessment renders the tax void. We think that is the necessary result. It is not a question of overtaxation of persons liable to be taxed, or of the omission of persons and property subject to taxation, or of including in an assessment a tax for an illegal purpose, or the neglect of a statute direction for the more convenient transaction of the business of assessors. It does not therefore fall within any of the decisions cited by the learned counsel for the defendants. It is a case where the tax itself has been assessed upon erroneous principles, in violation of the statute and of the policy by which the burdens of taxation have been apportioned. It was an assessment which could not be lawfully made.

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The decision of this point renders it unnecessary to consider the other objections made to the validity of the assessment. The result is that the plaintiff must recover the amount of the tax, but without the costs of the collection. *Shaw* v. *Becket*, 7 Cush. 442. *Judgment for the plaintiff.*

C. Devens, Jr. & G. F. Hoar, for the plaintiff.

N. Wood, for the defendants, cited *Dillingham* v. *Snow*, 5 Mass. 547; *Blackburn* v. *Walpole*, 9 Pick. 97; *Torrey* v. *Millbury*, 21 Pick. 64; *St.* 1815, *c.* 130; *Sprague* v. *Bailey*, 19 Pick. 436; *Coleman* v. *Anderson*, 10 Mass. 105; *St.* 1855, *c.* 461, § 2; Rev. Sts. *c.* 7, §§ 27, 37; *Watson* v. *Princeton*, 4 Met. 599; *Boston Water Power Co.* v. *Boston*, 9 Met. 199; *Howe* v. *Boston*, 7 Cush. 273; *Lincoln* v. *Worcester*, 8 Cush. 55; *Wright* v. *Boston*, 9 Cush. 233; *Bourne* v. *Boston*, 2 Gray, 494.

PETER PIERCE *vs.* ARTEMAS LEE & others, Executors.

Land was devised for life, and then directed to be sold and the net proceeds equally divided among the testator's children and their heirs. During the continuance of the life estate one of the children became insolvent, and his property was assigned under *St.* 1838, *c.* 163. *Held*, that his own share passed to his assignees; as well as his right in the share of another child deceased since the testator, if such other child died before the assignment, but not otherwise.

ACTION OF CONTRACT to recover two thirds of the proceeds of the sale, by the defendants as executors, of a farm of the plaintiff's father, who died in 1837, and by his will gave the use and improvement of said farm to his parents for life, and added this provision: "At the decease of my father and mother, meaning the last survivor, the aforesaid farm shall be sold for the most it will bring, and the net proceeds thereof equally divided among my children and their heirs." The testator's parents survived him, his father, who was the last survivor, dying in 1850. The testator left three children, the plaintiff, Lucy and Sophia, the last of whom died before her grandfather,

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unmarried and without issue. After the probate of the will, and before the death of the testator's father, the plaintiff became insolvent, his estate was duly assigned to assignees, and he obtained his certificate of discharge in insolvency. Said assignees, before the commencement of this action, executed a conveyance to a third person, purporting to convey all the plaintiff's right against the defendants for the proceeds of said sale. This action was brought by the plaintiff for his own benefit, without the consent of his assignees or of those claiming under them, and was submitted to the decision of the court upon the facts above stated.

P. C. Bacon, for the plaintiff, cited *St.* 1838, *c.* 163, § 5; *Emerson* v. *Cutler*, 14 Pick. 108; *Higden* v. *Williamson*, 3 P. W. 132; Leigh & Dalzell on Conversion, *c.* 6; *Morley* v. *Bird*, 3 Ves. 628; *Stuart* v. *Bruce*, 3 Ves. 632; *Holloway* v. *Holloway*, 5 Ves. 399; 2 Jarman on Wills, 22; Com. Dig. Bankrupt, D. 9.

G. F. Hoar, (*C. Devens, Jr.* with him,) for the defendants, cited *St.* 1838, *c.* 163, § 5; *Winslow* v. *Goodwin*, 7 Met. 363; *Gardner* v. *Hooper*, 3 Gray, 398; *Higden* v. *Williamson*, 3 P. W. 132; *Holland* v. *Cruft*, 3 Gray, 179, 180, & cases cited; *Grieveson* v. *Kirsopp*, 2 Keen, 653; Leigh & Dalzell on Conversion, 136, & cases cited; *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497; *Reed* v. *Underhill*, 12 Barb. 113; *Smith* v. *Kearney*, 2 Barb. Ch. 538; *Smith* v. *Starr*, 3 Whart. 62; *Hankins's Estate*, 4 W. & S. 300; *McGinnis* v. *Foster*, 4 Georgia, 377; *Field* v. *Hallowell*, 12 B. Mon. 517.

Shaw, C. J. The court are all of opinion that, by force of the testator's will, the estate vested in the father and mother for their lives respectively. But there being no devise over, the reversion in fee, by right of inheritance, passed by law to the heirs at law of the testator, who were his three children. Nor was this result prevented or affected by the power to sell, given to the executors. This power was accompanied by no express gift of the estate to the executors as trustees; nor was such legal interest in them necessary to the execution of their power, so as to pass by implication. A power of sale, accompanied by no gift of the legal estate, express or implied, is a naked power,

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which has no operation till executed; and then it operates by relation to defeat the estate of the heir or devisee. Indeed, in the present case, it was of very little importance to any real rights of parties, whether the power should be ever executed or not; because, when executed, the proceeds were to go to the same heirs and in the same proportions as those in which they took the reversion by inheritance. It was provided as a convenient mode of distributing the estate in money, instead of letting it pass as real estate, in case it should be thought advisable.

Before the death of the testator's father, and whilst the real estate was held by him as tenant for life, the plaintiff went into insolvency. The question is, whether, by the law of insolvency, the plaintiff's third in the real estate passed by the assignment to the assignees? The court are of opinion that it did. It was a valuable interest in real estate, defeasible only by a sale, which, if made, would substitute the proceeds for the real estate. The object of the insolvent law is to make the whole of the existing property of the debtor available to the payment of his debts, and is not confined to technically vested estates. The test given by the original insolvent law, *St.* 1838, *c.* 163, § 5, is this: "which assignment shall vest all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned or conveyed, or which might have been taken in execution, at the time of the first publication." We think the case is clearly within the principles laid down in *Gardner* v. *Hooper*, 3 Gray, 398. We are of opinion therefore that the insolvent's own third passed by the assignment to his assignees.

But a different rule may apply to the one half of one third, taken by the insolvent as heir of his sister Sophia, who died without issue and unmarried. His title to that did not accrue until her decease; and it does not appear whether her decease preceded or followed the insolvency of the plaintiff. If on inquiry it shall appear that it followed that event, then it is a new acquisition to the plaintiff after his insolvency, and he has a right to receive it and hold it to his own use. If she died previously to his insolvency, then the entire half goes to the assignees.

Judgment accordingly.

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THOMAS G. KENT *vs.* SALEM LEE & Trustee.

A writ against a mortgagor in possession, and against the mortgagee as his trustee, under *St.* 1844, *c.* 148, § 2, must be served by copy on the principal defendant, like other trustee processes.

BIGELOW, J. This s a process under *St.* 1844, *c.* 148, § 2, which authorizes a creditor to attach personal property under mortgage, when in the possession of the mortgagor, in like manner as if unincumbered, and to summon the mortgagee or his assigns as the trustee of the mortgagor. The only question raised is as to the sufficiency of the service of the writ on the defendant, which was by a separate summons, as in the ordinary case of an attachment of the goods or estate of the defendant. The objection to the service is, that it should have been made, as in case of a trustee writ, according to *St.* 1837, *c.* 210, § 1, and Rev. Sts. 90, § 39, in the same manner as an original summons without an attachment, by reading it to the defendant or serving him with a copy thereof.

This objection is supported by a literal interpretation of the language of *St.* 1844, *c.* 148, § 2, which, in giving the right to summon the mortgagee as trustee, uses the same phraseology as that adopted in Rev. Sts. *c.* 109, §§ 3, 4, concerning the process of foreign attachment. It is there provided that in such case the writ shall be in the form authorizing an attachment of the goods and estate of the debtor, and the person having goods, effects and credits of the principal defendant, "may be summoned as trustee." So under this statute the writ authorizes an attachment of the property of the debtor, and provides that "the mortgagee may be summoned as trustee." This is quite decisive, according to the well known rule of exposition of statutes, that where language is used having a well settled meaning fully understood in its application to a subject matter, it is to be interpreted in conformity with its usual signification, unless it clearly appears to have been used in a different sense. There is nothing in the statute under which the present action is brought, to indicate

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that the mortgagee was to be summoned as trustee in any different manner or by any other process than that adopted in case of foreign attachment.

But upon looking more closely into the provisions of this statute, it will be found to be only a slight extension of the trustee process, as used in connection with the same subject in the Rev. Sts. *c.* 109, §§ 25–28, and *St.* 1829, *c.* 124. By those provisions of statute a mortgagee having goods mortgaged in his possession might be summoned and charged as trustee under an order of court allowing the plaintiff to pay or tender the amount due to the trustee under the mortgage; and thereupon the mortgagee was to deliver the goods to the officer holding the execution issued in the suit, as in other cases where specific articles were in the hands of a trustee belonging to the principal defendant. The *St.* of 1844, *c.* 148, only extended this right to summon the mortgagee as trustee to cases where he was not in actual possession of the mortgaged property, with the additional right to the plaintiff of attaching the mortgaged property in possession of the mortgagor, similar provisions being made for the payment by the attaching creditor to the mortgagee of the amount found due under his mortgage. It seems to us therefore that the legislature did not intend to alter the process by which a creditor was enabled to reach mortgaged property, adjust the respective rights of the parties to it, and, after satisfying the lien upon it, apply it to the payment of his debt. It was only an extension of the same process, rendering it more efficacious, but not changing its nature, or the mode in which it was to be served. It follows that the present action must be regarded as a trustee process, and not having been served according to law, the entry must be

Action dismissed.

T. G. Kent, pro se.

C. C. Esty, for the defendant.

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Thomas Trees *vs.* Israel Rushworth.

Whether "the damages demanded exceed twenty dollars," and thus entitle either party to demand a trial by jury before a justice of the peace under *St.* 1852, *c.* 314, is to be determined by the *ad damnum* in the writ.

A motion to dismiss an action in the court of common pleas, for the refusal of the justice of the peace before whom it has been commenced to order a jury, cannot be entertained after the first term, even if a similar motion has been made before the justice.

Action of contract, commenced before a justice of the peace on the 27th of October 1855, to recover $17.95 according to an account annexed to the writ. The *ad damnum* in the writ was $40. The defendant on the return day demanded in writing a trial by jury. But the justice declined to order a jury to be summoned, on the ground that it was apparent from an inspection of the entire record, that the sum actually claimed and sought to be recovered was less than twenty dollars; and continued the action. The defendant, at an intermediate day, in writing, denied the plaintiff's right to maintain his action, and filed an account in set-off; and on the day to which the action had been continued, filed a motion that the action be dismissed, which was disallowed; and he thereupon submitted to be defaulted, and appealed to the court of common pleas. After the case had been in that court three terms, he renewed his motion to dismiss, which was allowed by *Perkins*, J., and the action dismissed accordingly, and judgment given for the defendant for his costs. The plaintiff appealed.

T. K. Ware, for the plaintiff.

G. F. Bailey, for the defendant.

Dewey, J. Upon the principal point argued in this case, the right of the defendant in this action, on the trial before the justice of the peace, to have a trial by jury, we have no hesitation in ruling that the justice erred in refusing the request of the defendant for a jury. Prior to the *St.* of 1852, *c.* 314, no such right could be claimed in a trial before a justice. By the provisions of that statute the jurisdiction of justices of the peace was extended from twenty dollars to one hundred dollars, with

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the further enactment that "where the damages demanded exceed twenty dollars," either party to the action may, on the return day of the writ, demand a trial by jury.

The question before us is whether the right to have a jury is to depend upon the statement of the demand in the declaration, or the amount stated in the *ad damnum* of the writ. Upon this point the analogies are very striking, as found in many cases that have been decided under other statutes, particularly those regulating rights of appeal, some of which are very like the present case in their language, as in the case of *St.* of 1820, *c.* 79, § 4, allowing an appeal in a personal action in which "the debt or damages demanded shall exceed the sum of one hundred dollars." The construction of this provision arose in a case where the demand or cause of action set out in the declaration was less than one hundred dollars, but the *ad damnum* was stated at more than one hundred dollars. This court held that, as to the right of appeal, "the debt or damages demanded" must be fixed by the sum stated in the *ad damnum*, and not by the sum stated in the declaration. *Chamberlain* v. *Cochran*, 8 Pick. 522. In accordance with this has always been the practical construction of the *St.* of 1840, *c.* 87, as to the question whether a case could be removed from the court of common pleas to this court. See also *Hapgood* v. *Doherty*, 8 Gray, 373.

The court are therefore of opinion that the justice erred in not ordering a jury as requested in the present case. Nor do we think that the defendant's pleading subsequently to the merits of the case was any waiver of his rights. He could do no otherwise, as he could not appeal at that stage of the case.

How far the right of appeal, when exercised, opens in the higher court questions of irregularity in the course of the trial below, may require further consideration, when a case arises in which that point shall be found necessary to be decided. The trial on the appeal is for the most part a trial independent of that below, and is given for the purpose of securing another tribunal to pass upon the whole case. Hence all questions of admission or rejection of evidence, and all rulings in matters of

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law, as well as the finding upon the facts, are in such cases by the appeal rendered unimportant, and are not the subject of consideration by the appellate court. Rev. Sts. *c.* 85, § 13. *Ball* v. *Burke*, 11 Cush. 80. All questions of jurisdiction of the court before whom a cause is pending are of course always open, and a motion to dismiss the appeal would properly present an inquiry as to the jurisdiction of the justice.

But in the present case the justice clearly had jurisdiction. His jurisdiction was, by the statute already cited, extended to all civil actions wherein the debt or damages demanded do not exceed the sum of one hundred dollars. The case was therefore properly before him, and it was his duty to have ordered a jury upon the request of the defendant. His failure to order a jury was no cause for a motion to him to dismiss the action, and the filing of such a motion could not be the basis for any future order of the court of common pleas to dismiss the same, the justice having jurisdiction of the case, although there may have been a mistrial.

Upon the appeal to the court of common pleas, if any objection was open there to this mistrial by reason of the justice's refusal to order a jury, (upon which we express no opinion,) it was not one founded on the want of jurisdiction, for which the court may be moved at any stage of the case; but a motion to dismiss for informality in the proceedings before the justice, and an erroneous ruling as to the mode of trial before him. Such motion, if sustainable at all, should have been made at the first term of the entry of the action in the court of common pleas, and, if not then made, must be considered as waived. In the present case it was not until the fourth term of the pendency of the action in the court of common pleas that a motion to that court to dismiss the action was made. This we think was too late, and all objections to the proceeding before the justice were waived by the delay. The order for dismissing this case, made by the court of common pleas, was erroneous, and is to be set aside, and the case remitted for trial.

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CALVIN FOSTER & others *vs.* ELI C. GOULDING & others.

If, after the filing of a creditor's petition for insolvency proceedings on the ground of a fraudulent preference, it is fraudulently agreed between the petitioning creditor and the debtor, in order to carry out such preference and to enable the debtor to obtain his discharge, that the debt of the petitioning creditor shall be paid and the petition dismissed, other creditors are entitled to come in and prosecute the petition.

THOMAS, J. This is a case of novel impression, but to be decided by the application of familiar principles. Our system of insolvency is comparatively new, and new questions may well be expected to arise, questions to which the words of the statutes will not furnish a direct answer; but which are not difficult of solution in the light of the general principles upon which a system of insolvency proceeds, and which our statutes recognize and affirm. It was in view of this practical difficulty of foreseeing and providing for every exigency which might arise in the application of the system, that the eighteenth section of the statute of 1838, *c.* 163, was framed, giving to this court jurisdiction in equity over the subject, and "power, in all cases which are not in the statutes otherwise specially provided for, upon the bill, petition or other proper process of any party aggrieved by any proceedings under the act, to hear and determine the case as a court of chancery, and to make such order and decree therein as law and justice shall require."

This is a bill in equity brought under the provisions of this section. To this bill a general demurrer is filed. Upon this demurrer the facts well stated in the bill are to be taken as true.

They are, in substance and in their order, so far as they are material to this inquiry, that Goulding (Eli), Gregory and Clark, lumber merchants, doing business under the firm of Gregory & Clark, were on the 14th of August 1856 insolvent, and, being so insolvent, made a conveyance of all the estate, real and personal, and all the choses in action of every name and nature of said Gregory & Clark, to Henry Goulding and

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Harrison Bliss, in contemplation of insolvency, with intent to make to the grantees payment of preëxisting claims and to give them a preference over the other creditors of said firm; the said Henry Goulding and Bliss having reasonable cause to believe that said firm was insolvent, and that said conveyance was made in contemplation of insolvency; that within six months after the making of such conveyance, to wit, on the 12th day of February 1857, one Dana, a creditor of the firm in a debt of an amount exceeding one hundred dollars, and provable against the estate, filed his petition in the court of insolvency for the county of Worcester, setting forth the facts before stated, and praying that after due notice a warrant might issue to take possession of the estate of said insolvents, and that further proceedings might be had for dividing and distributing the same among all the creditors of said Goulding, Gregory and Clark; that upon such petition a notice was ordered and served upon the alleged insolvents, returnable on the 18th of said February, but that "the defendants, before any hearing was had, combining to obtain fraudulent preferences in favor of said Dana, Henry Goulding and Bliss, over the plaintiffs and the other creditors, and to enable said Eli Goulding, Gregory and Clark, Henry Goulding and Bliss, to carry out the fraudulent purpose alleged in said petition, and to defeat and evade the operation of the insolvent laws, and to enable said Eli Goulding, Gregory and Clark to obtain their discharge under proceedings in insolvency to be subsequently commenced by them, did agree that said Eli Goulding, Gregory and Clark should pay or secure to said Dana his said claim, in whole or in part, and that said Dana should withdraw his said petition; that in pursuance of said arrangement said claim was paid or secured, in whole or in part, by the said Eli Goulding, Gregory and Clark, or by some one in their behalf, or by the said Henry Goulding and Bliss, and the same was received by said Dana, and thereupon said Dana neglected and refused to prosecute said petition," but on said eighteenth of February appeared before said court of insolvency and requested that the same should be dismissed; that at the same time the plaintiffs, who had relied upon said petition

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and upon its being prosecuted in good faith by said Dana, "also appeared, and applied to said court for a continuance of said cause, which was granted, and the same was thereupon continued to the 26th of said February, when the plaintiffs filed their petition in said court, verified by their oaths, in which they set forth substantially the facts herein before alleged, and prayed to be admitted to prosecute said petition for themselves and all other creditors, and that further notices might be given to the proper parties; which petition was disallowed by said court, and the petition of said Dana also dismissed."

The effect of this arrangement, if it can be successfully carried out by the defendants, is plain. No new petition could be filed till more than six months after the alleged fraudulent conveyance. Upon such new petition the validity of that conveyance could not be tested under the statute of 1841, *c.* 124, § 3, although under this statute, upon the facts stated, the conveyance was clearly void, and the property purported to be conveyed by it would pass to the assignees in insolvency for the benefit of all the creditors, and the making of such conveyance would prevent the granting of a certificate of discharge to the insolvents, or, if granted, render it of no effect. By this arrangement, if valid between the petitioning creditor and the preferred creditors, his debt is paid and their debt is paid, the entire estate of the insolvents exhausted in so doing, and the entire purposes of the statute defeated.

Not only is this the effect of the arrangement; but it is alleged in the bill, and admitted by the demurrer, that such were the object and purpose of the parties in entering into it.

Two questions arise: can this thing be done; and if not, what was the remedy? We think it cannot be done, because an act done in contravention of, and which manifestly tends to defeat the purposes and policy of the insolvent laws, is for that reason fraudulent and void. "A fraudulent contrivance," said Lord Mansfield in *Rust* v. *Cooper*, "with a view to defeat the bankrupt laws, is void, and annuls the act." Cowp. 632. This is well settled doctrine, and diligently and faithfully applied would defeat most of the contrivances and indirections by which the

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just and equal operation of the insolvent laws is prevented. See, among others, the recent cases of *Downs* v. *Lewis*, 11 Cush. 78, & authorities cited; *Wyles* v. *Beals*, 1 Gray, 233; *Edwards* v. *Mitchell*, 1 Gray, 239; *Zipcey* v. *Thompson*, 1 Gray, 243.

If then the transaction between petitioning creditors and the preferred creditors was void, by what mode are the rights and interests of the other creditors to be protected? What is the remedy? It is said that their only remedy was the filing of other petitions by the other creditors, which would have been under their own control. It may be that more than one petition could be filed for the same act of bankruptcy, though the decision upon the existence of such cause in the hearing on one petition would probably be conclusive upon all parties in interest, as in the nature of judgment *in rem*. If however the failure to maintain the petition was for want of proof of the debt of the petitioning creditor only, there might be reason for hearing the petition of another creditor whose claim was susceptible of proof. But whether more than one petition could be filed or not, we think more than one is unnecessary, if under it all the essential facts can be proved.

The petition of a creditor under St. 1838, *c.* 163, § 19, is not a process for the enforcement of his individual claim. Its object is to put the estate of the debtor into the custody of the law for its division and distribution among all the creditors of the debtor. It avers and proceeds upon the existence and proof of acts done by the debtor, of which such division and distribution are the legal consequence. Indeed, so far from being brought to secure the payment of his own claim, it ordinarily supposes a state of things in which its payment would be a fraud upon the other creditors. Such payment, under the English bankrupt laws, is of itself an act of bankruptcy on the part of the debtor. Archb. Bankr. (11th ed.) 66. And so it was in this case, the facts showing that the debtors were at the time insolvent, and that the petitioning creditor had reasonable cause to believe it.

Such being the purposes of the petition, when it is filed, and notice to the debtors has been issued upon it, we think that

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creditors who have received payment or security for their debts, in fraud of the insolvent law, cannot, by combination with the petitioning creditor and by payment in whole or in part of his claim, render the proceedings under it void and of no effect; that the other creditors may well rely upon its being prosecuted in good faith; that if the petitioning creditor fails so to prosecute it, the other creditors may be so far permitted to intervene as to accomplish the purpose for which the proceedings were instituted — the benefit of all the creditors by the equal distribution amongst them of the estate of the insolvent.

If it be suggested that the debt is paid and can no longer be the basis of such petition, the answer is, that in equity it is not paid; that for the purposes of the hearing it is not paid, because the law will not permit the fraudulent arrangement so far to take effect as to defeat its own policy and purposes.

We are of opinion therefore that the demurrer must be overruled, and that a mandamus should issue to the judge of insolvency to hear the petitioners upon their petition, and, if the facts alleged in it shall be found to be true, to permit them to come in and prosecute the original petition of Dana.

No suggestion was made at the argument upon what terms or with what provisions as to costs the plaintiffs should be allowed to come in, and all questions on this point are reserved.

Demurrer overruled.

F. H. Dewey, for the defendants.

T. L. Nelson, for the plaintiffs.

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ELMER MEED *vs.* THOMAS L. NELSON & another.

It is no objection to the proof in insolvency of a promissory note against the maker, that an accommodation indorser holds security from him, which has not been surrendered, and that the proof is offered at the indorser's request.

APPEAL from the disallowance by the court of insolvency of a claim offered for proof against the estate of Windsor Morse, an insolvent debtor. The appellant and the assignee stated the following case:

The claim was upon a promissory note made by Morse, payable to White or order, and indorsed by White for the accommodation of Morse to the appellant. White held a mortgage on real estate of Morse, to secure him against liability on his indorsement, and this was known to the appellant, who offered this claim for proof at White's request. The assignees objected that the claim could not be allowed until the mortgage had been delivered up to them, or applied to the payment of this claim.

F. H. Dewey, for the appellant.

T. L. Nelson, for the appellee, cited Burge on Suretyship, 485; *Eastman* v. *Foster*, 8 Met. 19; *Lanckton* v. *Wolcott*, 6 Met. 305; *Amory* v. *Francis*, 16 Mass. 308; *Agawam Bank* v. *Morris*, 4 Cush. 99; *Ex parte Greenhill*, 3 Dea. & Chit. 334; *Ex parte Sherrington*, 1 Mont., Dea. & DeGex, 195.

SHAW, C. J. It appears to us very clear that this claim ought to have been allowed. The plaintiff held no mortgage or other property of the debtor, pledged for the payment of this debt. White was a mere accommodation indorser, and might never be called upon, and in that case the mortgage would never become a charge upon the estate of the insolvent.

Decree reversed.

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JULIUS A. PALMER & others *vs.* HENRY M. PAINE.

The acknowledgment by a husband, after issue born, of a deed made by him jointly with his wife, of land held by her to her separate use under *St.* 1845, *c.* 208, is sufficient to authorize it to be recorded.

SHAW, C. J. To a writ of entry to foreclose a mortgage, the defendant answers, in the nature of a special nontenure, that he has no seisin. It appears however that he and his wife joined in a deed of the premises to Whipple by a deed acknowledged by Paine but not by his wife, and the same premises were afterwards duly conveyed by Whipple to the plaintiff.

The defendant denied that he ever had any title and seisin in the premises, and insisted that the seisin was in his wife, in her sole right, without the interference of a trustee, free from the control of her husband, under the *St.* of 1845, *c.* 208: that his acknowledgment of the deed was void, and did not warrant the registration of the same; and therefore it was to be regarded as an unregistered deed.

Registration is not necessary to pass title; as between parties, the title passes by the deed. *Dole* v. *Thurlow*, 12 Met. 157. The purpose of registration is notoriety, and, if it is so acknowledged by any one party to it, it is rightly registered, and then it is regarded as constructive notice to all the world as the deed of all other parties, as if acknowledged by them. *Shaw* v. *Poor*, 6 Pick. 86.

It is said that a deed cannot be read in evidence on a trial, unless it has been registered. Be it so; that is a mere rule of evidence; and if it is acknowledged or proved, it may be recorded in fact; or its execution may be proved according to law, and then it may be registered and the rule of evidence be complied with.

In considering the defendant's ground that he has no claim of seisin, it appears to us the first answer is, that he is estopped by his deed. In general, a deed with general or special warranty of title, with an acknowledgment which entitles it to registration,

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is regarded as equivalent to a grant at common law with livery of seisin, and therefore is a claim of seisin.

But a more decisive answer is, that Paine was not a mere stranger, but had some interest which would pass by the deed. The wife had the estate in her own right under the statute, in the case supposed, and as such might have alienated it by her will, perhaps by her deed in her lifetime. But then she might not. She was in fact seised of the estate during the coverture, and had children; and thereby the husband had an inchoate tenancy by the curtesy, which would be an absolute estate to him for his life, by operation of law, if she had not exercised her power to alienate. *Beal* v. *Warren*, 2 Gray, 457. Paine then had at the time a contingent interest in the estate, which rendered it proper for him to join; his deed might have some operation; his acknowledgment was sufficient to have the deed registered; and then it was good registration as against all parties. *Judgment on the verdict for the plaintiff.*

E. B. Stoddard, for the defendant.

D. Foster, for the plaintiff.

Eliphalet Thorpe *vs.* County Commissioners of Worcester.

A writ of *certiorari* will not be issued to correct the proceedings of county commissioners, who, after having adjudged that a road should be constructed, and having laid it out over a portion of the route proposed, have rescinded their adjudication on the ground that public necessity does not require the construction of the road over the remainder of the route.

It seems, that an adjudication of county commissioners that public convenience requires a road to be laid out may be rescinded by them at any time before the location of the road.

On a petition to county commissioners to rescind an adjudication that public necessity requires the construction of a road, no special notice need be given to the original petitioners for the road, if the road has been partially laid out; but the service of copies of the petition to rescind on the town clerks of the towns in which the said road is situated, and by posting copies of said petition in two public places of each of said towns is sufficient.

Petition for a *certiorari* to the county commissioners of Worcester to bring up a record of their proceedings concerning

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a highway. The case was argued upon the petition and answer.

The petition alleged that in 1846 the petitioners petitioned the said commissioners to lay out a county road from a point in Athol to a point in Dana; that in 1852 the commissioners adjudged that common convenience and necessity required the construction of a road over a part of the route prayed for, to wit, from said point in Athol to a point in Petersham; and in 1853 located said road over a part only of the route embraced in their adjudication, and ordered that part to be built; that in 1856, on the petition of Artemas Bryant and others, the commissioners rescinded their adjudication so far as related to the portion not laid out; that the same persons did not constitute the board of commissioners at the time of the first adjudication as at the time of the rescission; and that public convenience and necessity still required the laying out and construction of said road over the remainder of the route prayed for.

The commissioners admitted the several petitions and proceedings as alleged; but denied that the public good required the highway to be built; and alleged that a new parallel road had superseded the necessity thereof.

G. F. Hoar, (*C. Devens, Jr.* with him,) for the petitioner.

P. C. Bacon & P. E. Aldrich, for the respondents.

THOMAS, J. It is well settled that the petition for this writ is addressed to the judicial discretion of the court, and that the writ will not be granted if substantial justice has been done, though the record may show the proceedings to have been defective and informal. *Rutland* v. *County Commissioners*, 20 Pick. 77.

It is equally clear that the judgment of the commissioners upon the question of common convenience and necessity is conclusive, and that this court has no power to revise such judgment. *Commonwealth* v. *Westborough*, 3 Mass. 406. Rev. Sts. *c.* 14, § 31.

In the case at bar, the commissioners adjudged that the public convenience and necessity did require the laying out of a part of the way prayed for. They laid out the road only over

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a part of the route included in their adjudication. At a subsequent meeting the commissioners rescinded their adjudication as to so much of the route as had not been laid out, upon the ground that public convenience and necessity no longer required that it should be laid out.

We all incline to the opinion that the order rescinding the adjudication as to the part not located was right; that the adjudication that the public convenience and necessity require the laying out of the way is in its nature preliminary; and that no way becomes established until the location has been made. Rev. Sts. *c.* 24, §§ 6, 10, 11, 13, 31, 42, 43, 44, 46, 69, 72. St. 1842, *c.* 86. If the way is not established until it has been laid out, there could be no discontinuance, and the result of the want of power to revise the adjudication that public necessity and convenience require the way would seem to be that commissioners must proceed to locate and construct, although the reasons for so doing no longer existed.

But whether this be so or not, we think the point involved in the present proceedings was substantially decided in the case of *Hill* v. *County Commissioners*, 4 Gray, 414. In that case a petition had been made to the selectmen of Spencer to lay out a town way. They refused to do so. The petitioners, under Rev. Sts. *c.* 24, § 71, applied to the commissioners. The commissioners, upon a hearing of all parties interested, adjudged that the selectmen unreasonably refused to lay out the way, and that the wants of the town of Spencer required the location of a way as in their adjudication described. They afterwards laid out a part of the route and caused the same to be built. But a new road having been constructed, which rendered no longer necessary the laying out of the remainder of the way, they declined so to do. Application was made to this court for a mandamus to compel the commissioners to locate the remainder of the way. That petition, like this for a *certiorari*, addressed to the discretion of the court, was dismissed. The court would not compel the commissioners to do an act no longer required by the public wants or convenience. That certainly is a stronger case than the one at bar, the jurisdiction of the com-

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missioners as to town ways being but an appellate and limited one.

As to the objection that this order was rescinded without notice to the original petitioners, the question is not raised by the petition. There is no allegation of want of notice. And looking into the record, we find that, upon the petition of Bryant and others to rescind, notice was given by publication, by causing the town clerks of Petersham and Athol to be served with copies, and by posting attesting copies in two public places in each of said towns. No special notice to the original petitioners was necessary. As a part of the route prayed for was laid out and established, they were no longer liable for costs.

Petition dismissed.

William Hall *vs.* Liberty R. Wood.

A count for work and labor, with a bill of particulars, some items of which bear date more than six years before the commencement of the action, may be maintained for the full amount, notwithstanding the statute of limitations, if the whole work was done under an entire contract.

Action of contract for work and labor. Writ dated April 30th 1855. The plaintiff's bill of particulars contained two items for sawing lumber from January 1st to March 1st 1849, three items for sawing lumber from April 1st to May 10th 1849, and one item for five years' interest on the amount of the five previous items.

At the trial in the court of common pleas the defendant relied on the statute of limitations to bar a recovery of any of the items bearing date of more than six years before the date of the writ. The plaintiff produced evidence tending to show that all the lumber was sawed under one entire contract.

Aiken, J. instructed the jury that all such portions of the plaintiff's account as appeared to have been done more than six years before the commencement of the action would be barred

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by the statute, unless the contract was entire and the parties understood that no part was to be paid for till the whole was done; and that if the contract was entire, and the work was not done till the 10th of May 1849, the plaintiff might recover for the whole, notwithstanding the form of the bill of particulars before the date of the writ. The jury found for the plaintiff, and the defendant alleged exceptions.

E. B. Stoddard, for the defendant.

W. F. Slocum, for the plaintiff.

DEWEY, J. The contract upon which the plaintiff sought to recover being found by the jury to be an entire contract for sawing all the lumber stated in the plaintiff's bill of particulars, and to be paid for as one piece of work, the statute of limitations would not apply to the first two items in the bill of particulars.

It is however insisted on the part of the defendant that the plaintiff by his form of declaration is estopped from saying that the whole services were performed under an entire contract.

This objection would seem to assume that services performed under an entire contract cannot be recovered in an action on the common money counts. But this is not so; for, however special or entire the contract for labor and services, after the services have been fully performed, and nothing remains but to pay the money due therefor, the common counts are sufficient. *Morse* v. *Potter*, 4 Gray, 292. In any aspect of the case the form of the declaration was a proper one, and it being upon the common counts, the bill of particulars was properly filed, and its detailed statements did not estop the plaintiff from showing that all the items of services were performed under one contract.

Exceptions overruled.

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ABRAM J. GIBSON *vs.* EBENEZER K. GIBBS.

A wagon, with patent couplings attached, used by the owner in carrying on his business of selling patent couplings, is not exempt from attachment under Rev. Sts. c. 97, § 22, and *St.* 1855, *c.* 264.

ACTION OF TORT against a deputy sheriff for attaching on mesne process against the plaintiff his wagon, horse and harness.

At the trial in the court of common pleas the plaintiff introduced evidence that at the time of the attachment he was engaged in selling patent couplings for carriages, of which he was inventor and patentee; that the wagon in question was built for him expressly, with couplings attached, for the purpose of carrying on his business, and that the horse and harness were purchased by him for the same purpose; and claimed that the wagon, horse and harness were exempt from attachment under the Rev. Sts. *c.* 97, § 22, and *St.* 1855, *c.* 264. But *Sanger*, J. instructed the jury that if the plaintiff's business at the time of the attachment was selling patent couplings for carriages, and if, in their opinion, "the wagon, horse and harness, or either of them, were tools, implements, materials, stock or fixtures necessary for carrying on his said business, they should return a verdict for the plaintiff for the value of what they found thus necessary." The jury returned a verdict for the plaintiff for the value of the wagon, and the defendant alleged exceptions.

C. G. Stevens, for the defendant, was stopped by the court.

G. F. Verry, for the plaintiff.

BY THE COURT. This case is settled by the recent decisions of this court. *Smith* v. *Gibbs*, 6 Gray, 298. *Wilson* v. *Elliot*, 7 Gray 69. The wagon was not exempt from attachment.

Exceptions sustained.

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William Joslin *vs.* Benjamin Wyman.

A bond, given to a mortgagor by the mortgagee in possession just before his foreclosure is complete, conditioned to discharge the mortgage upon payment of the mortgage debt at a future day, before which the debt is paid and the mortgage discharged, prevents the foreclosure from taking effect.

Bill in equity for a reconveyance of land, and release of dower of the defendant's wife therein. The case is stated in the opinion.

Thomas, J. This is, we think, a plain case. Milton Joslin made a mortgage of a tract of land to the defendant, dated October 10th 1848, conditioned for the payment of a note of $500 on demand. The plaintiff is the assignee of the equity and the bond. On the same day Joslin gave possession to the defendant for breach of condition and for the purpose of foreclosure. On the 7th of October 1851, when the foreclosure was about to expire, the defendant gave to Milton Joslin a bond with condition that if Joslin paid the note secured by the mortgage before the 3d of January then next, he would discharge, annul and cancel the mortgage. On the 1st of January 1852 he gave a second bond, with condition to discharge the mortgage if the note should be paid on or before the 21st of June then next. The note was paid before the 21st of June, and on that day the mortgage was cancelled and discharged.

We cannot doubt that a foreclosure may be opened by express agreement of parties, or by facts from which such an agreement may be inferred. See *Lawrence* v. *Fletcher*, 8 Met. 153; 2 Hilliard on Mortgages, 18, 131, 132. But in the present case we think it more correct to say the foreclosure never took effect. The effect of the bonds was to extend the time within which the party might redeem; to keep the foreclosure open. *Quint* v. *Little*, 4 Greenl. 495. The contract to receive payment of the note within the times specified, and upon such receipt to discharge the mortgage, was wholly inconsistent with the foreclosure taking place before the expiration of such periods.

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As the estate was not foreclosed, no dower could be had, and no further act of release can be required of the defendant.

Bill dismissed.

T. K. Ware, for the plaintiff.

N. Wood, for the defendant.

JOHN B. CLARKE *vs.* RUFUS HASTINGS.

An answer by an indorser to an action on a promissory note does not sufficiently aver usury by averring that "the plaintiff reserved a greater rate of interest than is allowed by law, at the time of discounting said note for the defendant, to wit," a certain sum.

ACTION OF CONTRACT on a promissory note for $140 made by Andrew J. Waite on the 10th of April 1856, payable to the defendant in four months, and indorsed by the defendant.

The defendant in his answer "admits that he gave the note named in said process; but says that said plaintiff reserved a greater rate of interest than is allowed by law, at the time of discounting said note for said defendant, to wit, the sum of four dollars and fifty cents; and that a deduction from said note should be made as is in such cases made and provided."

The plaintiff demurred, "because the defendant's answer does not state in clear and precise terms from whom the plaintiff reserved a greater rate of interest than is allowed by law; or that it was reserved from the defendant; or the amount of interest illegally reserved by the plaintiff."

In the court of common pleas *Perkins*, J. sustained the demurrer, and gave judgment for the plaintiff. The defendant appealed.

P. C. Bacon & G. Swan, for the plaintiff.

W. A. Williams, for the defendant.

BY THE COURT. The answer does not set forth any usurious contract made by the defendant with the plaintiff, nor any reservation of usurious interest by the plaintiff, with the certainty and precision requisite to enable the defendant to enforce the forfeiture.

Demurrer sustained.

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LEONARD HARRINGTON *vs.* PRESCOTT A. THOMPSON & wife.

An action cannot be maintained against a husband and wife on their joint promissory note given for his debt; but upon discontinuance against her, and payment of costs, may be amended and prosecuted against him alone.

ACTION OF CONTRACT against husband and wife on their promissory note, dated April 9th 1856, by an indorsee before maturity of the note and without knowledge of the coverture. The defendants were married after the passage of *St.* 1845, *c.* 208, and before the passage of *St.* 1855, *c.* 364. The wife signed the note with the consent of her husband. The consideration of the note was a chattel sold to the husband. The parties submitted the above case to the judgment of the court.

H. Williams, for the plaintiff. A contract by a married woman with the assent of her husband is valid. *Stevens* v. *Beals*, 10 Cush. 291. Story on Notes, §§ 90, 91. 2 Bright on Husband & Wife, 41. Bingham on Inf. & Cov. 181–183.

T. L. Nelson, for the defendants. The contract of the wife, during coverture, while living with her husband, not being within *St.* 1845, *c.* 208, is wholly void. *Morse* v. *Toppan*, 3 Gray, 411. *Gerrish* v. *Mason*, 4 Gray, 432. *Stevens* v. *Beals*, 10 Cush. 291. The cause of action against the female defendant failing, the plaintiff establishes no joint contract, and must be nonsuited. 1 Chit. Pl. (6th Amer. ed.) 31.

BY THE COURT. The contract of the wife was made during coverture, and is not within the provisions of *St.* 1845, *c.* 208. No action therefore can be maintained against her on the note. But the plaintiff may discontinue the suit against the wife on payment of costs, and take judgment against the husband. *St.* 1839, *c.* 151, § 2.

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Dan Hill, Administrator, *vs.* Washington Hunt.

Money received by an agent of the wife with her husband's consent for her chose in action, and never reduced to possession by the husband, may be recovered from such agent by the administrator of the wife; and the husband's stipulations in an antenuptial contract, and in a mutual agreement of separation, are admissible to disprove any such reduction to possession.

An agent, who, having received money under an agreement to invest it forthwith, fraudulently converts it to his own use, is liable for interest from the time of the receipt, and without previous demand.

Action of contract by the administrator of Katharine Thompson for money had and received. At the trial in the court of common pleas the following facts were proved:

In 1802 the said Katharine married Elisha Thompson. Just before the marriage the parties entered into an agreement, reciting the contemplated marriage, and containing these stipulations:

"I the said Thompson on my part agree and promise the said Katharine that, if said marriage shall take place, she shall have the control and disposal of all the property she now possesses, and that she may do with the same at all times after the said marriage as she may think proper and fit; and that I and my heirs will make good to her all damages to any of the goods and effects she may bring to me, at my decease, and she shall have a right to take them away and dispose of the same to her own use and benefit in case she shall survive me, and if she should not survive me, the same shall go to her heirs or as she may dispose of the same by will.

"And I the said Katharine Taft on my part promise and agree that, if said marriage shall take effect, I will relinquish all my right, title and interest to all the estate he the said Thompson owns and possesses, and will acquit his heirs from all claim and demand I might have on the same in case he should not survive me; excepting however what I carry to him as above mentioned."

The parties lived together till 1805, when they finally sep-

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arated, and the husband made a bond to Sweeting Taft, conditioned that "the said Elisha Thompson shall give up to the said Katharine on demand all the household furniture and other property that now remains, which she at any time carried to him; and shall permit the said Katharine to collect what securities she may have against people by making use of his name when necessary, and convert the same to her own proper use and benefit;" and Taft made a bond to the husband, conditioned to save him and his estate "harmless against any expense or account of Katharine Thompson for her maintenance or on her claiming dower or thirds in said Elisha Thompson's estate." The husband, from the time of the antenuptial agreement until his death, was seised of real estate. Katharine Thompson died in 1836. Her husband died in 1843, when administration was taken out on his estate by Peter Thompson, who is now living, and has never relinquished that office. In 1852 the plaintiff was appointed administrator of the wife.

The plaintiff then offered to show that at the time of the marriage and of the separation Katharine Thompson was the holder of certain promissory notes payable to her, and of some other articles of personal property; that after the separation, with the consent of her husband, the notes were cancelled and others made payable to Daniel Farnum, and her other property also invested in notes payable to Farnum; that Farnum acted as her business agent and trustee, receiving, collecting and paying out her moneys under her sole direction, without the interference and with the consent of her husband; and that before her death the defendant became her business agent instead of Farnum, and conducted her business in a similar manner, receiving moneys for her and investing them in notes payable to himself, but recognized and treated by the parties as her property, and with an agreement that the proceeds of the notes should be held by him to her use.

The plaintiff further offered to show that the defendant had never paid over the proceeds of some of these notes; and that, at the death of said Katharine, he took possession of all her effects, and had ever since retained possession thereof, and that

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her husband in his lifetime, and his administrator since his decease, had made no claim to her property, and never taken out administration upon her estate; and that from her death to the time of the appointment of the plaintiff there had been a fraudulent concealment by the defendant of the cause of action declared on.

Mellen, C. J. ruled that on the foregoing facts the action could not be maintained, and directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

C. Devens, Jr. & G. F. Hoar, for the plaintiff.

C. Allen, for the defendant. 1. Any payment received on notes which belonged to Katharine Thompson was the money of the husband, and could have been demanded by him, and upon her death became his without taking out letters of administration. *Shuttlesworth* v. *Noyes*, 8 Mass. 229. *Legg* v. *Legg*, 8 Mass. 99. *Russell* v. *Brooks*, 7 Pick. 65. *Commonwealth* v. *Manley*, 12 Pick. 173. *Washburn* v. *Hale*, 10 Pick. 429. *Goddard* v. *Johnson*, 14 Pick. 352. *Hapgood* v. *Houghton*, 22 Pick. 480. *Sutton* v. *Warren*, 10 Met. 451. 1 Bright on Husb. & Wife, 34. Co. Lit. 351 *b*.

2. The antenuptial contract was void, because it was to be performed in part during the coverture, and because it was without consideration. The supposed consideration was a release of right of dower, but as no freehold estate was settled on the wife, the contract did not bar dower. *Gage* v. *Acton*, 1 Salk. 325. 1 Bright on Husb. & Wife, 18. *Gibson* v. *Gibson*, 15 Mass. 106. *Hastings* v. *Dickinson*, 7 Mass. 153.

3. The memorandum of an agreement of separation did not change the rights of the parties. *Ames* v. *Chew*, 5 Met. 320.

Dewey, J.* We have not found it necessary to decide to what precise extent the rights of Katharine Thompson and her husband Elisha Thompson would have been affected, during the continuance of the marriage relation between them, by the antenuptial articles entered into by the respective parties, in reference to the property which Katharine held in her own right

* Thomas, J. did not sit in this case.

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before and at the time of her marriage. The case has been argued on the part of the defendant mainly upon grounds which would have been more applicable to questions of the right of the husband, or his creditors, to appropriate Katharine Thompson's personal estate to the use of the husband, or in discharge of his debts. But the real inquiry here is as to the right of the administrator of Elisha Thompson to demand and recover choses in action, and moneys realized therefrom in the hands of an agent, who received them from Katharine Thompson in trust for her sole use, with the assent of her late husband. It is to be remarked that the question is not here raised by the administrator of Elisha Thompson. No claim to these choses in action, or their proceeds, has ever been put forth by such administrator since his appointment, which took place in 1843. The present defendant is the party alleged to have received these funds directly from Katharine Thompson. He has the right however to raise the question to what party he is to be held to account.

The first inquiry is, whether the husband ever actually reduced these choses in action, held by the wife at the time of the marriage, to possession, by virtue of any marital rights, supposing such to have existed; for the husband being now dead, upon his decease, if the property had not already been reduced to possession and become absolutely his, his administrator could not by any acts of his change the rights of the respective parties. In aid of this inquiry, it is proper to refer to any acts of the husband, indicative of his purpose to permit these funds to continue to be the separate property of the wife. For this purpose we may look at the contract or stipulations of the husband prior to the marriage, to see what he proposed to do; and that irrespectively of the question whether he was legally bound to carry his promise into effect. We find that stipulation on his part to have been, "that she shall have the control and disposal of all the property she now possesses, and that she may do with the same at all times after the said marriage as she may think proper." The facts in the case show no interference by him with her property from 1802 to 1805, the period during which they lived together. Upon a mutual separation agreed upon by

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the parties in 1805, it was directly stipulated by the husband in a sealed contract made with a third party, for the benefit of the wife, that he should permit his wife to use his name to collect whatever securities she might have, and to convert the same to her own proper use and benefit; the husband receiving from such third party a bond to save him and his estate harmless against any expense for her maintenance, or against her claiming dower in his estate.

Here we find a direct avowal on the part of the husband that he would not interfere with her property in these notes, but the same should continue to be held by her to her sole and separate use. This promise was literally fulfilled on his part. Neither during her lifetime, which extended to 1836, nor during his own, extending to 1843, did he do any act by way of asserting any right over these funds. The lifetime of the husband therefore passed away without reducing the same to his possession. His administrator has not attempted to exercise any control over them.

The case upon these facts is therefore most obviously one where the husband elected to treat the property as hers, as long as the coverture existed. It is a much stronger case than those familiarly known to us, where the husband had, by his declarations and acts, created a fund for the separate use of his wife, or allowed her to continue to enjoy as her separate estate funds accruing from property that she had at the time of the marriage, or under some subsequent devise or descent of estate to her, as was held in *Draper* v. *Jackson*, 16 Mass. 480, *Stanwood* v. *Stanwood*, 17 Mass. 57, and *Fisk* v. *Cushman*, 6 Cush. 20. The court are of opinion that this action was properly instituted in the name of the administrator of Katharine Thompson, and that the defendant may be properly held to account to her legal representatives for any liabilities arising from his holding funds of hers, which had thus continued to be held as her separate property. *Exceptions sustained.*

Upon a new trial in the court of common pleas at December term 1857, it appeared that Hunt, who was an agent of the

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plaintiff's intestate, had received money from her to invest forthwith; but that instead thereof he had fraudulently converted it to his own use; and that he had kept himself concealed so that the plaintiff had been unable to make any demand on him. The defendant contended that this action could not be maintained without proof of a previous demand; and, if it could, that interest should be allowed only from the date of the writ. But *Briggs*, J. ruled that the action would lie without a previous demand, and that interest might be recovered from the time when Hunt received the money. The defendant alleged exceptions, which were argued at October term 1858, and

Overruled by this court.

JOSIAH BARBER *vs.* ISAAC GODDARD & others.

A wife is not a competent witness under *Sts.* 1852, c. 312, § 60, and 1856, c. 188, nor, it seems, under *St.* 1857, c. 305, in an action to which her husband is a party, unless she is also one of the parties to the action.

ACTION OF TORT for forcibly breaking and entering the plaintiff's house and searching it.

At the trial in the court of common pleas before *Perkins*, J. at March term 1857, the defendants introduced testimony to show that their entry upon the premises and acts done therein were at the request of the plaintiff's wife, acting under his authority in his absence. To rebut this evidence the plaintiff offered his wife as a witness; but the court rejected her testimony. The verdict being for the defendants, the plaintiff alleged exceptions.

S. A. Burgess, for the plaintiff, cited *Phillips* v. *Bridge*, 11 Mass. 242; *Fitch* v. *Hill*, 11 Mass. 286; *Fisher* v. *Willard*, 13 Mass. 379; *Griffin* v. *Brown*, 2 Pick. 304; *Fuller* v. *Wheelock*, 10 Pick. 135; *Rice* v. *Gore*, 22 Pick. 158; *Tappan* v. *Bailey*,

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4 Met. 529; *Littlefield* v. *Rice*, 10 Met. 287; *Sts.* 1852, *c.* 312, § 60; 1856, *c.* 188; 1 Greenl. Ev. §§ 334–338, 341, 342; *Rutland & Burlington Railroad* v. *Lincoln*, 29 Verm. 206.

F. H. Dewey & H. Williams, for the defendants.

Bigelow, J. The only question in this case is as to the competency of the wife of the plaintiff as a witness in his behalf. At common law, she could not testify. Is she made competent by statute? The provision in *St.* 1852, *c.* 312, § 60, abolishing the disqualification of witnesses on the ground of interest in a suit, does not change the rule of the common law as to the competency of a wife; because it expressly enacts, that neither a party to a suit, not by law competent, nor the husband or wife of such party, shall be thereby rendered competent. She is not made competent by *St.* 1856, *c.* 188, by which parties are made competent witnesses; because that act in terms extends only to parties to actions and does not include the husband or wife of a party. The rule of exclusion at common law still remained in force when this action was tried, which was before the enactment of *St.* 1857, *c.* 305. But this last statute does not change the rule except where "the wife is a party or one of the parties to the action;" in such cases and in such only she and her husband are made "competent witnesses for or against each other."

The cases cited for the plaintiff are not applicable to the question raised here. They are cases where the wife has been a witness in collateral proceedings, or in suits between third persons, where the husband has been indirectly interested or has testified as a witness; and are not cases where the husband was a party to the suit or the party in interest.

Exceptions overruled.

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Joel Knapp *vs.* Horatio Slocomb.

Under the practice act, *St.* 1852, *c.* 312, § 2, a declaration in tort for breaking and entering a close need not contain any averment of time.

In an action of tort for breaking and entering a close and removing a fence, the defendant, under an answer which only denies the breaking and entering, cannot disprove the removal of the fence.

Under the practice act, *St.* 1852, *c.* 312, §§ 14, 26, a defendant who answers that he can neither admit nor deny, but leaves the plaintiff to prove the allegations in the declaration, may introduce evidence to rebut the plaintiff's case.

Action of tort for breaking and entering the plaintiff's close in Sutton, described in the declaration, and removing a stone wall and stakes of the plaintiff. The declaration contained no averment of time. The defendant in his answer alleged that he was ignorant whether the close described in the declaration belonged to the plaintiff, and whether he entered the plaintiff's close, and therefore could neither admit nor deny those allegations, but left the plaintiff to prove the same; and further answered that, if the plaintiff should prove that the defendant entered the plaintiff's close, then the defendant would prove that he entered with the consent and at the request of the plaintiff. Trial and verdict for the plaintiff in the court of common pleas, before *Aiken*, J., who signed this bill of exceptions:

"The plaintiff proved his title to the close, and the entry of the defendant, as alleged; and introduced evidence that the defendant moved a stone wall from the line which divided the land of the parties, upon the land of the plaintiff, and took and carried away a number of stakes, the property of the plaintiff. He also proved, the defendant's counsel objecting, that said entry was made in June 1855.

"The defendant proved a request by the plaintiff to the defendant to repair the line fence between the plaintiff and the defendant; and offered to prove that in pursuance of said request he entered the close, and that what he did thereon was done in pursuance of said request. The court permitted the

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defendant to prove said request, and that he entered said close in pursuance thereof; but ruled that the defendant could not justify the other acts he did on the close, as being done under said request, as he had not in his answer set forth any such grounds of defence.

"The defendant then offered evidence, for the purpose of contradicting the evidence of the plaintiff, that he did not move the stone wall as alleged in the plaintiff's writ. But the court excluded the evidence.

"The defendant then offered evidence, for the purpose of disproving the plaintiff's title and possession, that the title to a portion of the close described in the plaintiff's declaration was in a third person, and not in the plaintiff. But the court excluded the evidence. To all which rulings the defendant excepts."

C. E. Pratt, for the defendant.

F. H. Dewey, for the plaintiff.

Bigelow, J. 1. The objection, that evidence of the time of the commission of the trespass charged in the declaration was inadmissible, because there was no averment of time in the declaration, cannot be sustained. One of the main purposes of the practice act was to dispense with all useless and immaterial averments, which under the old rules of pleading were deemed essential. But in an action of trespass, charging only a single act, the allegation of time was never made with accuracy; the plaintiff being at liberty to prove any one act of trespass, committed at any time before the commencement of the action, either before or after the day laid in the declaration. *Pierce* v. *Pickens*, 16 Mass. 472. The averment of time therefore, in a declaration for trespass under the old form of pleading, gave the defendant no notice of the exact day on which the act charged took place. It was a merely formal averment. It therefore comes within the second clause of § 2 of the practice act, which provides that no averment need be made, which the law does not require a party to prove. The declaration in the present action conforms to the form given for actions of trespass *quare clausum* in the schedule annexed to St. 1852, *c.* 312.

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2. The second exception is founded on the ruling of the court, excluding evidence offered by the defendant to show that he did not commit the acts, alleged in the declaration, upon the plaintiff's close after his entry thereon. This ruling was right. The gist of the action was the breaking and entering of the plaintiff's close. All the other averments in the declaration were incidental to this allegation, and were inserted only by way of aggravation of the principal injury. They were not essential to the maintenance of the action, and could be proved only as affecting the amount of damages. *Gilbert* v. *Thompson*, 9 Cush. 348. Nor could the plaintiff have supported his action by proof of these allegations without evidence to show a forcible entry of his close. If therefore the defendant had proved a justification of the entry by a license from the plaintiff, he would have made out a complete defence to the plaintiff's entire case, and would have been entitled to a verdict, although he had shown no justification for the other acts alleged by way of aggravation. He would thus have rebutted the gist of the action, and all incidental matters would necessarily have fallen with it. This is the familiar rule at common law, and it remains unchanged by express provision in section 6 of the practice act.

But these averments of acts done after the entry, in aggravation of the principal injury, were properly made in the declaration. Without them the plaintiff would not have been entitled to damages for their commission, because, being in their nature special damages, not necessarily flowing from the forcible entry on the plaintiff's close, they could not have been recovered unless specially averred. *Baldwin* v. *Western Railroad*, 4 Gray, 333. They were therefore substantial facts distinctly averred. If the defendant intended to controvert them, it was his duty to deny them; and not having done so, he was rightly held at the trial to have admitted them under section 26 of the practice act.

3. The remaining exception seems to us to be well taken. The defendant offered evidence to show that the plaintiff had no title to the close, and was not in possession of the premises at the time of the alleged trespass. This evidence was rejected

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by the court, and, we think, erroneously. The denial of the defendant was in the form required by the practice act when he is ignorant of any fact stated in the plaintiff's declaration. It was therefore the duty of the plaintiff to prove it. It was a fact in issue, in like manner as if it had been distinctly denied by the defendant as being within his own knowledge. Being in issue, and open to proof by the plaintiff, it was competent for the defendant to produce evidence to disprove the allegation. It was denied according to the requirement of the practice act, and could not properly be deemed to have been admitted. If this were not so, it would follow that no fact could be put in issue and tried, which the defendant was not able to deny on his own knowledge in clear and distinct terms. Such a construction would be contrary to the express provisions of §§ 14 and 26 of the practice act. *Exceptions sustained.*

PELEG ALDRICH *vs.* PHILANDER AMES.

An oral promise, for a valuable consideration, to indemnify another from his liability as bail for a third person, is not within the statute of frauds.

SHAW, C. J. The case comes before us nominally as upon a bill of exceptions taken by the defendant at the trial in the court of common pleas; but the bill of exceptions has been so much modified by the consent of parties with special agreements, that it is in effect an agreed statement of facts, upon which the court is to enter judgment.

The case in substance is, that the plaintiff, at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless.

The ground of defence is, that this was an alleged promise of the defendant to pay the debt of another, and therefore that

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the action cannot be maintained without an agreement in writing, because it is within the statute of frauds.

The court are of opinion that this ground is wholly untenable. This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds.

The theory of the statute of frauds is this; that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A., a debtor, owes a debt to B., and C. promises B., the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case, should C., on good consideration, promise A., the debtor, to pay the debt to B. and indemnify A. from the payment, although one of the results is to pay the debt to B., yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt.

This rule appears to us to be well settled as the true construction of the statute, well confirmed by authorities. *Eastwood* v. *Kenyon*, 11 Ad. & El. 438 and 3 P. & Dav. 276. *Harrison* v. *Sawtel*, 10 Johns. 242. *Chapin* v. *Merrill*, 4 Wend. 657. *Chapin* v. *Lapham*, 20 Pick. 467. *Alger* v. *Scoville*, 1 Gray, 395.

Exceptions overruled.

G. F. Hoar, for the defendant, submitted the case without argument.

P. C. Bacon, for the plaintiff.

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*City of Worcester vs. Benjamin Walker.

Marshals appointed under a city ordinance which directs that they shall also be appointed constables, and that marshals shall pay over to the city the fees received by them in criminal cases or in the service of the city, and shall have salaries in full for all their services, are liable for such fees received by them as constables.

A city ordinance giving police officers a fixed salary, and requiring them to pay over to the city the fees received by them as witnesses, or as penalties in criminal cases, or for service of any criminal process, or for any services in behalf of the city, is not contrary to public policy.

Action of contract for fees received by the defendant while assistant marshal and constable of the city of Worcester. The case was submitted to the decision of the court upon these facts:

The mayor and aldermen of Worcester, by the city charter, have "full and exclusive power to appoint constables, and a city marshal and assistants, with the powers and duties of constables, and all other police officers." St. 1848, c. 32, § 8.

In 1854 the city government passed an ordinance containing the following provisions: "Sect. 1. The mayor and aldermen shall annually, as soon after the organization of the city government as may be convenient, and whenever any vacancy occurs, appoint a city marshal and assistant marshal or marshals; and they shall severally be appointed constables of the city, and take the oath and give bonds according to law, and shall continue in office until their successors are qualified." "Sect. 5. The assistant marshals, upon receiving any fees as witnesses, or penalties in any criminal case, or for service of any criminal process, or for any services in behalf of the city, shall forthwith pay over the same to the marshal. The marshal shall keep an account of all moneys thus received from his assistants, and shall pay over the same, when received, together with his own fees as witness in any criminal case, or for service of any criminal process, and all moneys received in behalf of the city, to the city treasury." "Sect. 7. The marshal shall be paid the sum of one thousand dollars per annum in full for all his ser-

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vices; the assistant marshals shall be paid the sum of seven hundred dollars each per annum in full for all their services; said salaries to be paid in quarterly payments, but only to such assistant marshals as shall have paid over the fees required of them by section five."

The defendants were appointed assistant marshals and at the same time constables, and gave the bonds required by law of constables, and entered upon and discharged the duties and received the salaries of both offices during the year 1855.

The processes, to recover fees for the service of which the present action is brought, were made in course of the general police business of the city, in behalf of the Commonwealth, under the direction of the marshal, and were in most instances committed to the defendant for service by the marshal; but the returns upon them were made by the defendant as constable, and he claims to have received them as such. All witness fees received by the defendant while attending the police court as a witness, have been paid over to the city. The witness fees unpaid are only such as have been received as a witness in the court of common pleas.

C. Devens, Jr. (*G. F. Hoar* with him,) for the plaintiffs.

P. E. Aldrich, for the defendant.

Bigelow, J.* By virtue of the charter of the city of Worcester, *St.* 1848, *c.* 32, § 8, and the ordinance of the city of 1854, the marshal and his assistants were *ex officio* constables. It was the persons appointed to and holding both offices — the office of constable being incidental to that of marshal or assistant marshal — who were required by section fifth of the ordinance to pay into the city treasury the fees received by them for service of criminal processes. The words "assistant marshals" in this section are used as *designatio personarum*. The manifest purpose of the provision was to require that they should pay over, not only the fees which they should receive when acting strictly as marshals, but also those which the persons thus designated should receive for service of criminal processes, with-

* Thomas, J. did not sit in this case.

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out reference to the capacity, whether as marshal or constable, in which they should be received. No other construction is consistent with the explicit provision of the ordinance that their salaries shall be in full for all their services. The powers and duties of assistant marshals in executing criminal process are nearly identical with those of constables, and these powers and duties comprehend a large part of the services required of those holding the office of city marshal. If the construction for which the defendant contends should be adopted, it would follow that it would be wholly optional with the officers whether they should receive any fees for serving criminal processes as marshals. By electing to act and make their returns as constables instead of as marshals, they might in all cases of the service of criminal process receive the fees to their own use, and thus obtain a compensation which was clearly intended to be included in their salaries. Such is not the true interpretation of the language of the ordinance, nor could it have been so understood by the defendant when he accepted office under it.

We can see nothing in the provision of the ordinance, requiring fees received by the marshal and his assistants to be paid into the city treasury, which in any degree contravenes public policy. On the contrary, it is well calculated to aid and support it. By giving a fixed salary to these officers who are intrusted with important duties, all temptation to multiply prosecutions for the sake of obtaining fees and all motives for extortion and oppression are taken away, and greater fidelity is likely to be secured by a fixed and reasonable compensation than by an uncertain and fluctuating one. Nor is there anything in this provision, to bring it within the principle of the common law which renders void all contracts made for the sale of public offices. There is no corrupt agreement here between individuals by which money is to be paid for obtaining a public office or influencing the appointing power, nor is there any contract for the payment of money to benefit the persons making the appointment. There is nothing which tends to divert attention from the real merits of those applying for office, or which can lead to any improper influences in making the ap-

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pointment or performing the duties of the office. It is like the ordinary case of a salary established for a public officer, for whose services certain fees are fixed by law, but who is obliged to account therefor to the public treasury.

Judgment for the plaintiff.

JOSIAH A. BRIGHAM & others *vs.* HANNAH MAYNARD.

Under *Sts.* 1854, cc. 406, 428, the widow of one who leaves no children, if she waives the provision made for her in the will, is entitled to the whole of the personal property, if it does not exceed five thousand dollars.

APPEAL from the decree of a judge of probate, allowing to the appellee, the widow of Moses G. Maynard, the whole of his personal estate, upon these facts: In 1855 Moses G. Maynard died, leaving kindred, but no issue, and having disposed of his estate by will; and leaving personal property, which, after the payment of debts, amounted to less than five thousand dollars. The appellee duly waived the provision made for her in the will.

C. Devens, Jr. & G. F. Hoar, for the appellee.

H. Chapin, for the appellants.

THOMAS, J. The widow having waived the provision made for her in the will of her husband, the question is, to what share of his estate she is entitled by law. He died without issue.

Under the Rev. Sts. *c.* 60, § 11, she would have her dower in the estate of which he was seised during the coverture, which she had not released; and, under the *St.* of 1838, *c.* 145, such part of the personal estate as the judge of probate should allow for necessaries for the use of herself and the family under her care.

Under *St.* 1854, *c.* 428, she is entitled to such portion of the real and personal estate as she would have been entitled to if her husband had died intestate, with this limitation, that she is not to receive more than ten thousand dollars out of the per-

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sonal estate. By ascertaining then what, under the existing statutes, she would be entitled to receive if her husband had died intestate, we shall learn what she is to receive when she waives the provisions of her husband's will.

Under the St. of 1854, c. 406, passed on the same day with c. 428, taking effect with it, and existing in full force at the time of the death of the testator, she would be entitled to one half of the real estate of which he died seised, during the term of her natural life; and to the whole of the personal estate remaining after payment of the debts of the deceased with charges of his funeral and settling his estate, provided such residue does not amount to more than five thousand dollars. If such residue does amount to more than five thousand dollars and less than ten thousand dollars, she would be entitled to five thousand dollars out of the same; if the residue amounts to ten thousand dollars, or upwards, to one half thereof. But when there is a will, and the widow waives its provisions, the amount of personal shall not exceed ten thousand dollars.

But the provisions of this chapter 406 of St. 1854 are in lieu of dower at the widow's election. If within six months after administration granted she elect to take her dower, she may do so. Electing to take dower, she has no share of the personal estate.

The St. of 1854, c. 406, took effect at the same time with c. 428. We must suppose that, both being on the same subject, it was foreseen that they must be construed together.

But the legal effect would be the same if the provisions of c. 406 had been adopted at any time subsequent to those of c. 428. To determine what is meant by taking "such portion of the real and personal estate as she would have been entitled to if her husband had died intestate," we must look to the law regulating the descent and distribution of intestate estates at the time of the husband's decease. Suppose we were to say that she should take her share as of an intestate estate under the revised statutes, that is to say, first, dower in all the lands of which the husband was seised during coverture; second, one half of his personal estate. If the value of the real estate of

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which he was at different times seised, and of which dower was not barred, was sixty thousand dollars, and land of the value of forty thousand dollars had been conveyed or taken on execution without release of dower, the wife would have her life estate in twenty thousand dollars, one third of the whole. His personal estate, we may suppose, after paying debts, &c., is twenty thousand dollars. The wife takes one half. She then has her life estate in twenty thousand dollars of real estate, and ten thousand dollars of personal estate absolutely. Under the St. of 1854, with the same property she would have a life estate in one half of the real property of which he died seised, that is, ten thousand dollars; and the same personal estate, ten thousand dollars. Under the *St.* of 1854, she would receive the use of ten thousand dollars less than under the revised statutes. Or, if she waived the provisions of the will and also elected to take dower instead of the benefit of the provisions of §§ 1, 2 and 3 of *c.* 406, she would have the same dower as under the revised statutes, but no share of the personal estate; she would have ten thousand dollars absolutely.

It is suggested that under this construction of the statute the husband, having no children, who leaves less than five thousand dollars, all in personal property, cannot, as against his widow, make a disposition of this property by will. This may be so, and might be a good reason for not adopting the statute; or, if the statute were of doubtful meaning, might aid in its construction; but, where the language of the statute is clear and explicit, can have no effect.

Decree affirmed.

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JONAS BROWN, Administrator, *vs.* CALVIN G. HOWE.

The guardian of a lunatic cannot be allowed in his probate account the amount of damages occasioned to his own property by his ward's want of care.

APPEAL by the administrator of the estate of Daniel Saunders, an insane person, from a decree of the judge of probate allowing his guardian's account, including this item: "For loss sustained by accountant by fire caused by want of care on part of said Daniel Saunders over and above amount received by insurance."

At the hearing in this court, the appellee, in support of the item, offered evidence that "Saunders, by want of ordinary care, set fire to the dwelling-house of the appellee, in which he boarded as an inmate of his family, whereby the house was destroyed and Saunders perished at the same time." *Bigelow*, J. reported this question to the full court.

P. C. Bacon, for the appellee. A lunatic is liable for his torts. *Weaver* v. *Ward*, Hob. 134. *Morse* v. *Crawford*, 17 Verm. 499. This claim is a proper subject of charge and account in the probate court. Rev. Sts. *c.* 79, §§ 4, 5, 9, 10, 17, 18. *Grinnell* v. *Baxter*, 17 Pick. 383. And see *Jackson* v. *Jackson*, 1 Grat. 143. It is like a claim of an administrator for a tort of his intestate. See Rev. Sts. *c.* 66, §§ 18, 19. If the ward had done a like injury to a third party, it would have been the duty of the guardian to settle and pay the claim. *St.* 1855, *c.* 432, § 1. The guardian can maintain no action against his ward during the guardianship. *Mason* v. *Mason*, 19 Pick. 506. *Smith* v. *Philbrick*, 2 N. H. 395. His claim against the ward would therefore be barred if the guardianship should continue more than six years; so that he would lose his claim, if he cannot include it in the guardianship account, unless he should resign his trust, and that resignation should be accepted by the court.

C. Allen & H. Chapin, for the appellant.

THOMAS, J. The appellee was guardian of Daniel Saunders, an insane person, now deceased. In settling his account in the

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probate court, the guardian charged and was allowed this item: "For loss sustained by accountant by fire caused by want of care on part of said Daniel Saunders over and above amount received by insurance." The date and amount of the item are not given. From the allowance of the account, including this charge, the administrator of the ward appealed to this court. Whether the item is the subject of charge in the appellee's probate account is the question for our consideration.

The item sought to be charged is a claim for unliquidated damages. Two things are clear: first, there is no express provision of the statute under which claims for damages for torts can be proved in probate accounts; secondly, there are no precedents for their allowance, so far as our reports show.

If we look to the nature of such account, its object and purpose, it will be plain that damages for a tort cannot be included in it. An account, as used in the probate law, is the statement of the receipts and payments by a trustee concerning the estate confided to his care; the detailed statement of its administration while in his hands, what has been received, and from what sources, what has been paid out and for what purposes, and the balance, if any, remaining. The accounts are evidenced by books and vouchers, with occasional resort to the testimony of witnesses.

A claim for unliquidated damages, as for assault and battery, or action on the case for negligence, by a guardian against his ward, cannot be made part of his account. It is not a matter arising from the trust. It is a question for a court of common law, to be tried at its bar and under its rules.

In the case before us, it is a question where the plaintiff and defendant are represented by the same person, and the personal interest of the trustee is in conflict with that of his trust, and where, it may be, all the weapons of defence are in the hands of the plaintiff. The existence and prosecution of such a claim are inconsistent with the continuance of the relation, and would be sufficient reason for its termination.

It would seem to be clear therefore that such a question could not be settled even in a court of common law, while the rela-

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tion of guardian and ward continued. To say that a guardian can settle with himself for a tort of his ward, affecting his person, character or property, and then make the amount so paid an item of charge in his account, seems still more difficult. It is a matter outside of the trust, and with which the relation of guardian and ward has nothing to do.

Upon the termination of the relation by the death of the ward, the difficulties of adjusting such a claim in a probate account increase rather than lessen. The claim not growing out of the trust, and the guardian having no lien upon the funds in his hands for its payment, the balance in his hands as guardian, after payment of his disbursements and services, goes into the hands of the administrator to pay the funeral expenses, the expense of settling the estate, and the debts. The claim of the guardian for damages for the tort has no preference over other debts and claims against the estate, and he cannot retain the property in his hands as trustee to meet it.

But the trust being terminated and the claim surviving, his only course is to sue the administrator in a court of law, and, having its judgment fixing the damages, to collect it from the assets, if the estate is solvent; if not, to share with the other creditors. *Decree reversed and case remitted.*

RUFUS M. HUNTLEY *vs.* DAVID WOODWARD & others.

A written agreement for drawing stone "at the rate of one dollar and twenty five cents per load of two tons each," fixes the rate by the ton, without regard to the number of tons actually drawn in one load; and cannot be varied by oral evidence.

ACTION OF CONTRACT upon this agreement in writing, signed by the defendants: "An agreement this day made between D. Woodward & Co. of Worcester, and Rufus M. Huntley of Fitchburg. Said Huntley agrees to draw all the stone from Rollstone Hill, so called, to the crane at Worcester depot and

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Bates's shop, at the rate of one dollar and twenty five cents per load of two tons each; and said Woodward & Co. agree to furnish men to load said Huntley with all his junk or grout stone at one cent a foot, that he may want this season. Fitchburg, July 17, 1855."

At the trial in the court of common pleas, there was evidence of the number of tons drawn by the plaintiff, and it appeared that some of the loads drawn by the plaintiff exceeded two tons in weight; and the plaintiff claimed sixty two and a half cents for each ton drawn.

The defendants contended that under said agreement they were to pay only $1.25 for each load, whether of two tons or more; "and in order to aid in the construction of the agreement, offered to prove the following facts: 1st. That the object in inserting the term 'two tons each,' as expressed by the parties at the time, was to prevent the plaintiff from drawing loads of a less quantity than two tons. 2d. That no stone had ever been drawn from the quarry by the ton, but the custom had been to draw by the day or by the load. 3d. That there was no place where the stones could be weighed, which were drawn to Bates's shop. 4th. That a portion of the stone drawn under the contract was charged by the load. 5th. That the defendants had no knowledge that the plaintiff was keeping his account by the ton, till after the stone were all delivered. 6th. That the defendants' agent, who was present at the time the contract was made, and heard the bargain, kept the account by the load, and supposed the plaintiff was keeping his account in the same way. 7th. That the stone delivered at Bates's shop was not weighed by the plaintiff, but, as he says, the weight was ascertained by measurement, which was taken by himself while on the road between the quarry and the place of delivery, and that no one was present when the measurement took place."

But *Mellen*, C. J. excluded the evidence, and ruled that the plaintiff was entitled to recover sixty two and half cents a ton for all stone drawn under the contract. A verdict was returned for the plaintiff accordingly, and the defendants alleged exceptions.

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H. Williams, for the defendants.

C. H. B. Snow, for the plaintiff.

SHAW, C. J. The whole clause is to be taken together — "at the rate of one dollar and twenty five cents per load of two tons each." The words "two tons" show what was to be considered a load. The words "at the rate of" show that it was to be at the rate of so much for two tons. "At the rate of" so much "per load," without defining the load, would be useless. This writing is not made for the benefit of one party more than of the other, but of both. It is very clear that it must be computed for two tons, whether the load be larger or smaller.

To admit the evidence offered would be to put parol evidence against written language, which was as plain as language could make it. The custom being uncertain, was an additional reason for making it certain in the contract. The entries of one party on his own memorandum could have no effect, not being made known to or acted upon by the other party. What the defendants' agent supposed cannot control the written agreement. The evidence as to the plaintiff's mode of ascertaining the weight had no bearing upon the construction of the contract.

Exceptions overruled.

DANIEL GODDARD & others, Trustees, *vs.* MAYOR AND ALDERMEN OF THE CITY OF WORCESTER.

The mayor and aldermen of a city, upon a petition for the assessment of damages by the raising of a street in front of the petitioner's house, accepted the report of a committee recommending that no damages should be allowed to the petitioner, but that the street should be lowered in front of the land, "so that said house shall stand relatively to the street as it did before the alteration, now complained of, providing any action in the case is necessary." Three months afterwards, the mayor and aldermen, upon a request of the petitioner to act on his petition, voted to meet at the premises to view them, but took no farther action in the matter. *Held*, that the acceptance of the report was a judgment against the petitioner's claim for damages; and that this judgment was not waived or modified by the subsequent action of the board.

PETITION, presented by the Trustees of the Pleasant Street Baptist Meeting-house on the 11th of October 1853 for a man-

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damus to the mayor and aldermen of Worcester. Hearing before *Bigelow*, J., who reported this case to the full court:

On the 9th of December 1850 the petitioners presented a petition to the respondents for the assessment of damages sustained in altering the grade of Pleasant Street, by raising and filling up the same about two feet in front of their premises. On the 21st of January 1851 the respondents accepted a report of their committee on highways, to which the case had been referred, which stated that "the committee would not recommend that damages be appraised and allowed the said trustees, but that the committee on highways be directed to lower the street in front of said meeting-house so that said house shall stand relatively to the street as it did before the alteration was made that is now complained of; providing any action in the case is necessary." On the 13th of October 1851 the petitioners in writing requested the respondents to act on their petition, and the respondents voted to meet at the meeting-house on a certain day and hour to view the premises; but they did not meet on the premises at the time appointed, and there was no record of any further action by them in the matter. On the 23d of August 1852 the respondents ordered "that the height, width and grade of the sidewalks in Pleasant Street be established as they are now indicated by the existing curbstones, so far as those curbstones have been set by the authority of the city." The petitioners had no notice of this order, and objected to the curbstones being placed where they were set.

E. B. Stoddard, for the petitioners.

C. Devens, Jr. & G. F. Hoar, for the respondents.

Bigelow, J.* The action of the mayor and aldermen of the 21st of January 1851, accepting the report of a committee of their number, in which they refuse to recommend that "damage be appraised and allowed the said trustees," was equivalent to a refusal to assess any damages on the petition. It was a judgment against the petitioners' claim for damages, which would have authorized an application for a jury according to

* Thomas, J. did not sit in this case.

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the provisions of law. Nor was this refusal waived or modified by the subsequent action of the board in October 1853. The previous vote was not reconsidered, the grade of the road was not changed, and no action was taken which in any degree altered the previous refusal of the board to give the petitioners any damages. *Monagle* v. *County Commissioners*, 8 Cush. 362. *Smith* v. *Mayor & Aldermen of Boston*, 1 Gray, 72.

Petition dismissed.

HARTFORD STODDARD *vs.* ASA B. WOOD.

A partner, who has made a promissory note to the partnership as evidence of the amount drawn out of the firm by him, and afterwards, upon dissolution of the partnership, assigned all his interest in the property and debts of the firm to his copartner, is not liable to an action on the note by the latter, who has taken the note by indorsement from the partnership, when overdue, and with notice of the facts.

ACTION OF CONTRACT on a promissory note made by the defendant to the order of and indorsed by "H. Stoddard & Wood."

At the trial in this court the defendant offered to prove that he and the plaintiff, at the time of the making of this note, were copartners under the firm of H. Stoddard & Wood; that this note and others of like tenor were made as evidence of sums of money drawn by the defendant from time to time out of the partnership funds; that the partnership was dissolved, and the defendant thereupon executed a written assignment, for a nominal consideration, by which he transferred to the plaintiff all his right, title and interest in "all and singular the stock of goods and merchandise, debts, bonds, specialties, notes, accounts and other estate and effects, rights and credits of the said concern of H. Stoddard & Wood," and appointed the plaintiff his attorney in his name or in the name of the partnership, to ask, demand, sue for, recover and receive all sums of money, property and effects, debts, dues, accounts and other demands whatsoever, which were or should be due, payable or belonging to the partnership; and that the note in suit was indorsed when overdue, and after the dissolution of the partnership.

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Bigelow, J. reserved for the consideration of the whole court the question whether the plaintiff had any title to the note by said indorsement.

P. C. Bacon & H. Chapin, for the plaintiff.

C. Allen, for the defendant.

Shaw, C. J. This note was given for money drawn by the defendant out of the partnership of which he was a member, and for no other consideration; and was indorsed when overdue, after the dissolution of the partnership, to a partner having full knowledge of all the facts, and therefore standing on no better ground than the indorsers.

This note, given as it was, constituted an item of debit in account, for which no action lies; it was not a debt to the firm. The difficulty of maintaining an action by a partnership against one partner is not merely a matter of parties, arising out of the difficulty of bringing suit; it lies much deeper. A promise by a partner to the partnership is a promise to pay himself with other persons; and it cannot be said that anything is due until the whole is settled, until all the assets are collected, and all debts paid. Until then, it cannot be known whether there is any balance due; still less, what that balance is.

The plaintiff does not stand in the position of a third person to whom the note has been indorsed. He was a member of the partnership, and had full notice that it was taken in account, not in the course of business, or for the purpose of paying a debt to the partnership; and, above all, he took it when dishonored, which is of itself a sufficient defence.

The assignment of all the property and debts of the partnership did not include this note, not being a debt due to the partnership, on which an action would lie; but, as already stated, a mere certificate, a statement in writing which he could not contradict, that he owed so much money to the firm.

The evidence was admissible to show want of consideration; the fact of partnership; and that the note was indorsed when overdue, and after the dissolution. These are facts surrounding the making and indorsement of the note, which do not control or vary it. *Plaintiff nonsuit.*

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James H. Wall *vs.* Brigham Balcom.

A., having given his notes to certain creditors of a partnership for debts due to them from the partnership, gave a written agreement to one of those creditors, that he would not enforce the amount of said notes against the partnership, until said creditors should have been fully paid all sums then due and thereafter to be due from the partnership, and that the amount of his notes "as to all said creditors should remain as part of the business capital of" the partnership for three years. *Held*, that this agreement did not make A. a copartner, nor prevent his proving against the estate of the partnership in insolvency a note given to him by them in consideration for his said notes.

Appeal from a decree of a commissioner of insolvency, allowing against the estate of Wall & Balcom, insolvent debtors, a promissory note for $1600, made by them to the plaintiff.

At the hearing in this court the plaintiff testified that when the firm of Wall & Balcom was first established he guarantied the payment of certain purchases of goods by them, and before the price fell due gave his notes in payment therefor to the amount of $1600, which he had since paid, and the giving of which was the consideration of the note offered for proof; and that one of the parties to whom he gave these notes was Snelling, Leland & Co., to whom, on the same day, he also gave the following written agreement:

"Whereas I, James H. Wall, have heretofore given written guaranties to certain creditors of Wall & Balcom, and have cancelled said guaranties by substituting my notes therefor, said notes amounting in all to the sum of two thousand dollars: and whereas Snelling, Leland & Company as creditors of said Wall & Balcom hold one of said notes to the amount of one thousand dollars: and whereas, for the better security of said creditors, it is my intention, in case of my paying said notes, not to enforce them afterwards against said Wall & Balcom, until said creditors shall first have been paid: Now know ye, that in consideration of one dollar to me in hand paid, and for other valuable considerations, I do promise and agree to with said Snelling, Leland & Company, that after I have paid any and all of said notes given to said creditors as aforesaid, I will neither directly

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nor indirectly enforce them nor the amount thereof against said Wall & Balcom, until after said creditors shall severally have been fully paid, in aforesaid sums now due, and hereafter to become due, and in and for all debts hereafter contracted by Wall & Balcom in their business. The said amount of two thousand dollars, as to all said creditors, is to remain as part of the business capital of said Wall & Balcom. This agreement is to be good for the term of three years from this date and no longer. Dated this thirtieth day of June A. D. 1855. James H. Wall."

Bigelow, J. directed a verdict for the plaintiff, subject to the opinion of the full court upon the question whether the note was barred by the agreement.

D. Foster, for the defendant. The agreement does not disclose a case of money lent to the insolvent, with a contract not to sue therefor: but of money put into the business "as capital" with a contract not to withdraw it. If the money was put in for the benefit of the plaintiff, he is a partner. If he gave any of the creditors to understand that it was for his own benefit, he is a nominal partner. If he intended and the creditors understood that it was put in for the benefit of the insolvents, he cannot withdraw it, and has no claim on the estate until the three years expire. By making it "capital," he subjected it to the payment of the debts of the firm, and if at the end of the three years it is all consumed in such payments, he has no claim on the firm. Whether it constituted him such a partner as to render him liable for losses, or entitled to profit, is immaterial. It at least renders him liable to the extent of a limited partner. Rev. Sts. *c.* 34.

If it is construed an agreement not to enforce his claim, yet, inasmuch as the defendants have no adequate remedy at law for a breach of the agreement, this court will restrain him.

T. L. Nelson, for the plaintiff.

Bigelow, J. It seems to us to be quite clear that the note of $1600 constitutes a valid claim against the estate of the insolvents. It is a debt for which they were liable before their insolvency, given upon a good consideration as to them; and it was due and payable from them at the time of the commencement

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of the insolvent proceedings. It is therefore a debt which may be proved and allowed against their estate in the hands of the assignee.

The agreement between the plaintiff and Snelling, Leland & Company in no sense constituted a partnership. The plaintiff was not to be liable for losses, nor was he to share in the profits of the business carried on by the insolvents. The amount paid by him to take up the debts of the insolvents was not to be at the risk of their business, as in case of capital contributed by a special partner. Taken in its broadest sense, it was only an agreement on the part of the plaintiff with some of the creditors not to enforce his claim against the debtors in competition with certain of the creditors. But this does not create a bar to its proof against the estate of the debtors. If by its terms any equities were created and now exist between the plaintiff and some of the creditors with whom it was made, by which, in marshalling the assets of the estate, the payment of the note is to be postponed until the claims of those creditors are first paid, such equities cannot be entered into or adjusted in this proceeding, which is in the nature of a suit at law to ascertain the amount due and provable against the estate of the firm in the hands of the assignee; and not to determine upon the rights of creditors as to the order of payment out of the assets, or to administer any equities existing between different classes of creditors. Those must be adjudicated in another mode of proceeding, appropriate for such purposes. St. 1838, c. 163, § 18. *Cushing* v. *Arnold*, 9 Met. 23.

Verdict affirmed.

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Ralph Ewings *vs.* Benjamin Walker.

An officer seizing intoxicating liquors by a warrant issued under *St.* 1855, *c.* 215, § 25, is liable as a trespasser, upon the subsequent abatement of the proceedings because the notice to the keeper was not returned to the proper court, although no order is passed for the return of the liquors, and notwithstanding § 38.

Action of tort for the taking and conversion of spirituous liquors and the vessels containing them. The defendant admitted the taking, and the plaintiff's property; but alleged that he seized them under a warrant issued to him by the police court of the city of Worcester on a complaint under *St.* 1855, *c.* 215, § 25. The liquors seized exceeded twenty dollars in value, and a notice was issued by the police court to the person complained of, pursuant to §§ 26, 30, returnable before the court of common pleas, but was in fact returned by the officer into the police court; and the complaint was therefore abated in the court of common pleas; but no order was passed for the return of the liquors and vessels. The plaintiff demanded them of the defendant, who refused to give them up without an order of court. The defendant can show, if competent, that the liquors and vessels, when seized by the defendant, were in the possession of the city marshal of Worcester, having been taken by him from the plaintiff, who had held them with intent to sell them in violation of law. Upon these facts the parties submitted the case to the decision of the court.

G. F. Verry, for the plaintiff.

P. E. Aldrich, for the defendant. 1. The warrant authorized the seizure of the vessels, and required the defendant to keep them until the final order of the court, which might be either for the confiscation or for the return of the liquor. *St.* 1855, *c.* 215, §§ 24–30. Until such final order the plaintiff has no right of action.

2. The liquors, being kept by the plaintiff with intent to sell them in violation of law, were not property, for the seizure of which any action could be maintained. The *St.* of 1855, *c.* 215, § 38, expressly declares that no action "shall be had or main-

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tained against any officer for seizing, detaining or destroying any intoxicating liquor or the vessels containing it, unless such liquor and vessels were legally kept by the owner thereof." And see *Fisher* v. *McGirr*, 1 Gray, 46; *Pierce* v. *Jackson*, 6 Mass. 242; *Albee* v. *Ward*, 8 Mass. 79.

3. A process not void, but only voidable for mistake or irregularity, is a sufficient justification for an officer acting under it. *Sanford* v. *Nichols*, 13 Mass. 286.

THOMAS, J. The plea in abatement of the proceedings was sustained by the court of common pleas. The defendant had no longer any legal claim to the custody of the goods seized. The provisions of the St. of 1855, c. 215, § 28, in relation to a written order for the return of liquors, apply to cases where the proceedings are regular and valid, but in which upon the trial it has not been proved that the liquor was kept or deposited for sale contrary to law. Such order is not provided for where the proceedings are void. Upon the demand of the plaintiff the liquor and vessels should have been restored. Such demand and refusal were a conversion of the property by the defendant.

Such conversion would not be protected under the language of the thirty-eighth section of the statute, even if that section were susceptible of the construction given to it by the counsel of the defendant. If the statute left the owner remediless for property so converted, we should feel compelled to say it was a clear violation of the 11th article of the Declaration of Rights, which declares that every subject ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property or character. See *Fisher* v. *McGirr*, 1 Gray, 46-48. *Judgment for the plaintiff.*

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Robert P. Wiggin *vs.* Jonathan Day.

A person who by the form of a sale fraudulently obtains possession of chattels, with the intent never to pay for them, has no property which his attaching creditor can hold against the vendor.

In replevin of goods on the ground that they were obtained by the defendant from the plaintiff by fraud, evidence of other similar frauds practised by the defendant upon third persons about the same time is competent evidence.

Replevin of two wagons, attached by the defendant as a deputy sheriff on mesne process against Hiram E. Brastow. Trial in the court of common pleas before *Perkins*, J., who signed a bill of exceptions, in substance as follows:

The plaintiff testified that he sold the wagon to Brastow for cash, and contended that by reason of the nonpayment of the price according to agreement the property had not passed. The instructions of the court on this point were not excepted to.

The plaintiff also, as evidence that Brastow bought these wagons with the intent and purpose not to pay for them, offered to show that, about the time of this sale, Brastow was insolvent, and purchased large amounts of personal property of third persons, and got them into his hands by fraud, and then secreted them in various places. To the introduction of this evidence the defendant objected; but the court admitted it.

It appeared that the service of the writ under which the defendant held the wagons was never completed, and the writ never returned to court. And the plaintiff, against the defendant's objection, was permitted to prove that before the return day, and by direction of the attaching creditor, the attachment was abandoned and all further proceedings on that writ stayed.

The court instructed the jury that if the wagons were attached by the defendant without knowledge of any fraud, under a proper writ against Brastow, which he had since returned, and held by him as a deputy sheriff at the time of the replevin, this action could not be maintained, though Brastow had obtained the delivery of the wagons to himself by fraud, and though the sale might be therefore void as between the plaintiff and Brastow; but that the defendant could not make that defence under

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a process, the service on which had never been completed, and which had been abandoned before the return term, and not returned to court.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. F. Verry, for the defendant.

F. H. Dewey & H. Williams, for the plaintiff.

METCALF, J. As we understand these exceptions, the case was tried on the question whether Brastow obtained the wagons from the plaintiff by fraud, and the jury found that he did. Brastow, therefore, acquired no property in the wagons, which his attaching creditor can hold against the plaintiff. *Buffington* v. *Gerrish*, 15 Mass. 156. *Ayers* v. *Hewett*, 19 Maine, 281. *Bussing* v. *Rice*, 2 Cush. 48. The instruction as to the defendant's justifying under a writ of attachment, was therefore immaterial, and not a subject of exception.

The evidence of other frauds practised by Brastow, about the same time, was rightly admitted, according to the decision in *Rowley* v. *Bigelow*, 12 Pick. 307. *Exceptions overruled.*

GEORGE HOBBS *vs.* JOSEPH B. FULLER.

An entry for foreclosure of a mortgage, under Rev. Sts. c. 107, § 2, duly certified and recorded, is sufficient, without notice to the mortgagor, or to a subsequent mortgagee, who is in possession under a previous entry for foreclosure; and is not waived or postponed by the first mortgagee's subsequently rendering an account to the owner of the equity of redemption, charging himself with rent beginning at a later period.

BILL IN EQUITY filed on the 26th of February 1855 to redeem land in Worcester from a mortgage. Hearing before *Bigelow*, J., who reported to the full court this case:

On the 10th of February 1852 the defendant, who was first mortgagee, entered upon the land for breach of condition, and for the purpose of foreclosure; and a certificate by two witnesses of his entry was filed and recorded, as required by Rev. Sts.

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c. 107, § 2. Between the 10th and 16th of said February the defendant gave notice of his entry to Henry D. Stone, the owner of the equity of redemption. At the time of the entry one tenement in the house on the premises was occupied by a ten ant of Burgess, a second mortgagee, who had previously entered for breach of condition of his mortgage, and duly recorded a certificate of his entry. Neither Burgess nor his tenant had any notice or knowledge of the defendant's entry, and such tenant continued to pay rent to Burgess until the 1st of April 1852, after which the defendant received all the rents, having leased the whole to a new tenant who took possession towards the end of March. On the 3d of May 1853 the defendant, at Stone's request, made out an account of the amount due to him on his mortgage, in which he charged himself with rent only from said first of April. Stone afterwards paid off the second mortgage, taking an agreement from Burgess to discharge it or assign it to whoever Stone should name; and conveyed the premises to Hobbs by deed of warranty.

P. C. Bacon, for the plaintiff. Under the Rev. Sts. c. 107, § 1, the defendant's entry, in order to be open and peaceable, must have been made known to Stone and Burgess, so that they could oppose it if they saw fit. The facts do not show that the defendant had three years' actual possession. *Northampton Paper Mill* v. *Ames*, 8 Met. 1. *Swift* v. *Mendell*, 8 Cush. 357. *Cook* v. *Hinsdale*, 4 Cush. 134. *Ayres* v. *Waite*, 10 Cush. 72. *Lawrence* v. *Fletcher*, 10 Met. 344. *Stone* v. *Ellis*, 9 Cush. 95. *Bennett* v. *Conant*, 10 Cush. 163. *Shepard* v. *Richards*, 2 Gray, 424. *Smith* v. *Johns*, 3 Gray, 517. The account rendered by the defendant shows that he did not consider his possession as beginning until the 1st of April. If he took any possession on the 10th of February, he waived it.

F. H. Dewey, for the defendant.

THOMAS, J. This bill is brought too late. The entry having been made by the defendant on the 10th of February 1852, the foreclosure became perfect on the 10th of February 1855. The possession taken by the defendant was in conformity with the provisions of the statutes, and there is no evidence from which

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a waiver of his possession could have been inferred. Rev. Sts. c. 107, § 1. *Raymond* v. *Raymond*, 7 Cush. 605. *Swift* v. *Mendall*, 8 Cush. 357. *Bennett* v. *Conant*, 10 Cush. 163. *Palmer* v. *Fowley*, 5 Gray, 545. *Bill dismissed.*

JOHN Q. ADAMS *vs.* GEORGE W. BOURNE.

One who uses a carriage, hired in his name by another without previous authority or subsequent ratification, without reasonable cause to believe that the carriage was hired on his account, or that he was looked to for pay for its use, is not liable for its use, although the owner had no notice that the hirer procured it on his own account.

ACTION OF CONTRACT by the keeper of a livery stable for the use of a carriage and harness. At the trial in the court of common pleas the plaintiff introduced evidence tending to show that the carriage and harness were procured of him by one Mayo on account of the defendant, and were used by Mayo with a horse of the defendant in building and repairing houses for the defendant, and once by the defendant and once by his wife in his absence. The defendant introduced evidence tending to show that whatever Mayo did for him was done under special directions, and that he was not his general agent; that the plaintiff did not believe at the time of letting the carriage and harness to Mayo that he had any authority to hire them on the defendant's account; and that the defendant did not know that they were procured on his account until after they had been used as aforesaid.

The plaintiff contended, 1st, "that if Mayo was the general agent of the defendant, and procured said carriage and harness of the plaintiff on the defendant's account for any purpose, within the general scope of his authority as such agent, the plaintiff was entitled to recover for the use thereof." 2d. "That if Mayo was in the service of the defendant, and procured said carriage and harness of the plaintiff on the defendant's account, and used them in the defendant's business, and they were used by the servants or family of the defendant, or by the defendant

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himself, the defendant was liable to pay for the use thereof, unless the plaintiff had notice that Mayo procured them on his own account."

Aiken, J. gave the first instruction requested, and declined to give the second; and also instructed the jury as to the distinction between general agents and special agents for particular transactions in a manner not excepted to; and "that they might find the defendant liable in this case, if he had given Mayo a previous authority to hire a carriage, or if such hiring came within the scope of Mayo's authority as agent or servant of the defendant, or if the defendant had subsequently ratified the act of hiring by Mayo; that the use of the carriage by the defendant or by his wife or servants would not necessarily render the defendant liable; but if Mayo was in the service of the defendant, and procured the carriage on the defendant's account, and used it in the defendant's business, and it was also used by the defendant himself or his wife or servants, as proved in this case, they might find a verdict for the plaintiff, if the defendant had reasonable cause to believe that the carriage was hired on his account, or that he was looked to for pay for the use of the carriage." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

W. P. Slocum, for the plaintiff, cited 2 Selw. N. P. 1120; *Precious* v. *Able*, 1 Esp. R. 358; *Pickering* v. *Busk*, 15 East, 38; *Rimmell* v. *Sampays*, 1 Car. & P. 254; *Lobdell* v. *Baker*, 1 Met. 202, 203; 2 Kent Com. (6th ed.) 614.

The defendant submitted the case without argument.

THE COURT *Overruled the exceptions.*

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James Phelps *vs.* Paris Tourtellot.

The owner of a mill on a stream, and of a right to flow during half the year part of the meadow on which the head of water was raised, and of the right to flow the residue of the meadow all the year, granted to the owner of a mill above his own and at the outlet of the meadow a privilege to draw water "sufficient to carry a water wheel well constructed, with twelve feet head and fall, for two common blacksmith bellows, and, should the head and fall be less than twelve feet, sufficient to carry one bellows twelve hours in twenty four, in either case in the day time, as near as may be." *Held*, that the grantee took, as against the grantor's mill, the whole power granted for the whole year; but, as against third persons, only that power limited by the restriction of the grantor's right of flowing part of the meadow; that the rights acquired by the grant might be designated in equity by some other mode of measurement; that the restriction was not affected by a previous reservation to an intermediate mill, also owned by the grantor, of a right to flow the whole meadow at all seasons; and that a subsequent purchaser of the lowest mill and of the land occupied by the dam and reservoir, if he did not use that mill, was not bound to keep the dam in repair for the benefit of the privilege above granted; but could not hoist the gates of the dam and thus waste the water to the injury of that privilege.

Action of tort, praying for relief in equity, by the owner of a machine shop on Mill Brook in Sutton, with a privilege of drawing water "sufficient to carry a water wheel well constructed, with twelve feet head and fall, for two common blacksmith bellows, and, should the head and fall be less than twelve feet, sufficient to carry one bellows twelve hours in twenty four hours, in either case in the day time, as near as may be;" and of another privilege below, known as the "Hooker privilege;" to compel the owner of a saw mill still lower down, and of the reservoirs and dams above, by which the whole head of water was raised, to keep in repair the dam at the outlet of the lower reservoir above the plaintiff's machine shop; to restrain him from hoisting the gates of the dam, against the plaintiff's rights; to ascertain whether the defendant's right to draw water for his saw mill was not servient to the plaintiff's rights; and to determine the manner in which the plaintiff might draw water for the purpose of satisfying his rights, and "prescribe the quantity of water, which the plaintiff may so draw, by some definite, intelligible and convenient admeasurement;" to fix the time during which the defendant might draw the water from the

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reservoir for the purpose of enabling him to dig clay or manure from the meadow covered thereby; and for other relief. Upon this bill a temporary injunction was issued.

The defendant, in his answer, objected to the jurisdiction of the court in equity over the matters alleged, and set forth his own claims. The case was submitted to the court upon the bill and answer and a statement of facts, so much of which as is material is given in the opinion.

This case was argued at September term 1856.

I. M. Barton, for the plaintiff.

P. C. Bacon, for the defendant.

THOMAS, J. The first question which arises is, what are the respective titles of the parties, plaintiff and defendant.

The plaintiff owns the site of the machine shop and privilege as to water, conveyed by deed of Amos Waters, Jr., of August 14th 1846. That is the same water privilege conveyed by Phelps to said Waters, by deed of June 22d 1835. It is not restricted to the blacksmith's business. *Tourtellot* v. *Phelps*, 4 Gray, 370.

The plaintiff also owns the Hooker privilege, by two deeds of December 1st and December 14th 1855. That is an estate derived from Jason Waters, as follows: Jason Waters was the owner of the (now called) Hooker privilege and of the farm connected with it, and the lower half of the meadow, which constitutes the lower reservoir. So holding, in 1823 he conveyed to Daniel Tourtellot the farm, "reserving the right of flowing at all seasons the meadow by the brick yard (with the privilege of passing and repassing to the dam for the purpose of raising and shutting the gate and of repairing the same dam) except at such times and seasons as the said Tourtellot shall wish to dig clay or manure."

The land of the lower reservoir, subject to the easement of flowing, &c., and with the right of digging clay or manure, came by mesne conveyances to the defendant. The defendant owns the Tourtellot land, on which are both the reservoirs and dams. He also owns the saw mill, which is below the Hooker privilege on the same stream.

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Both parties claim the land they own from Judah Waters. In 1780 Judah owned the machine-shop lot on both sides of Mill Brook, and he also owned the lower part of the meadow flowed. He owned the site of the dam at the outlet thereof, and the dam. He owned the saw-mill privilege below (now in the defendant) with a large tract of other contiguous land.

On the 5th of July 1780, Judah Waters conveyed to Samuel Waters the site of the plaintiff's machine shop, "together with the privilege of flowing the meadow up the brook from the premises, and keeping up the dam to flow said meadow annually to the first day of April, for the benefit of carrying on the blacksmith business at the shop on the premises; provided the water is not to be raised to flow said meadow till the first day of November annually, and not to be kept up after the first day of April, except it be by the consent of either party. And the said Samuel Waters is hereby granted liberty to pass and repass to said dam, and repair the same, as shall appear beneficial for the uses aforesaid of carrying on said works by water."

The meadow to be flowed is up the brook from the premises some forty to fifty rods; the dam which the grantee had the right to keep up was at the outlet of the meadow; and he had the right of passing and repassing across the grantor's land to said dam, and to repair the same. Samuel Waters, when he received this deed, owned the upper half of the lower meadow. From Samuel Waters the right to flow the upper half, together with the estate and privilege conveyed by Judah Waters, came to the plaintiff in 1830. In the same year the plaintiff became the owner of the saw mill.

In 1832 the defendant and John A. Tourtellot, having built a new dam above the old one, at the outlet of the lower meadow, conveyed to the plaintiff all the privileges of and to the new dam, which Phelps had in and to the old dam; Phelps releasing all right in the old.

In this state of the title, the plaintiff, Phelps, in 1832 made a deed to Samuel Waters and Peregrine Waters of the site of the machine shop and his rights to the dams and reservoirs above. Samuel and Peregrine in 1833 reconveyed to Phelps their rights

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to the dams and reservoirs, without the machine-shop site, granting to Phelps the right to use said ponds, dams and water for the benefit of his saw mill or any works he may have below the land of the grantors, as a right prior to any right of the grantors. The site of the machine shop was not reconveyed; but this passed from Samuel and Peregrine Waters, by several mesne conveyances, to Amos Waters, Jr.

Amos Waters, Jr. being the owner of the machine-shop site, Phelps made to him the deed of June 22d 1835. That deed conveys to Waters a privilege to draw water from the dams of said ponds or reservoirs, "sufficient to carry a water wheel well constructed, with twelve feet head and fall, for two common blacksmith bellows, and, should the head and fall be less than twelve feet, sufficient to carry one bellows twelve hours in twenty four hours, in either case in the daytime, as near as may be."

Phelps, the plaintiff, had before 1835 acquired the right to flow the upper meadow, constituting the upper reservoir, by deeds of Samuel Rich and Jonathan Davis. No question is made by the parties as to this right, or that it existed throughout the year.

In 1835, then, when Phelps made this deed to Amos Waters, Phelps's title was as follows: He owned the right to flow the upper meadow at all seasons of the year. He owned the right to flow the upper half of the lower meadow. He owned the right to flow the lower half from the first of November to the first of April annually, if this right could be severed from the site of the machine shop. He did not own the site of the machine shop; that was in Amos Waters.

In this state of the title, what could he convey as against the owner of the Hooker privilege, or the owner of the land constituting the lower half of the reservoir? The answer would seem to be, the right as stated in his deed, with the limitation as to time, resulting from the defect of his own right; but, as against the saw mill then owned by him, without the restriction. With this last qualification the effect of the conveyance of Phelps in 1835 would be to give to Amos Waters, the owner

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of the site of the blacksmith's shop, the right to use the quantity of water as measured in the deed, with the limitation as to time stated in the deed of Judah Waters to Samuel Waters, that is, from November to April.

It is to be observed, that in a deed made by Daniel Tourtellot to Paris Tourtellot in 1824 the reservation is of a right to flow at all seasons of the year. But Daniel held under the deed from Jason Waters of October 16th 1823, and the reservation made is the same as that made by Jason Waters. Jason, when he made the reservation, was the owner of the Hooker privilege; and this reservation was for the Hooker privilege, and is appurtenant to that only. The plaintiff's purchase of the Hooker privilege in 1855 did not enlarge the rights incident to the machine shop. *Ballou* v. *Wood*, 8 Cush. 48. The rights incident to the Hooker privilege are not transferred to the machine-shop privilege. The right now appurtenant to the machine shop therefore is the right conveyed by the deed of Phelps to Waters in 1835, with the limitation of time from November to April, owing to the fact that the grantor had no more to convey. The quantity of power is capable of being designated by some other mode of measurement. This may in equity be done by reference to a master, who may be directed to inquire what has been the use under the deed. *De Witt* v. *Harvey*, 4 Gray, 486.

We do not see that, by becoming owner of this dam at the outlet of the lower meadow, the defendant became bound to keep it in repair for Phelps or the owner of the machine-shop privilege. If he uses the saw mill, he may be bound to contribute to the support of the dam. On the other hand, he cannot hoist the gate of the dam, and suffer the waters to run to waste so as to defeat the rights of the machine-shop privilege. As against the saw mill the water rights of the machine shop are prior and dominant; for, when conveyed by Phelps in 1835, he was the owner of the saw mill.

The right of the defendant to dig clay and manure seems to be at his pleasure. No abuse of this right is shown, and there is no occasion for a decree on this subject.

The injunction, so far as it forbids the defendant to hoist the

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gate to waste the water of the reservoirs, should continue; but he should not be enjoined to keep the dams in repair.

It appearing that the plaintiff, at the time of instituting his suit, was the owner of the machine-shop privilege and all rights annexed thereto, of the Hooker privilege and of all the rights embraced in the Jason Waters reservation, the question of the relative rights of the machine-shop privilege and of the Hooker privilege becomes a mere abstract question, the decision of which is not necessary to the settlement of the relative rights of the plaintiff and defendant.

For the same reason it is not necessary to adjust or fix by decree a new mode of measuring the power annexed to the machine-shop privilege. *Decree accordingly.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1857 AT CAMBRIDGE.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. BENJAMIN F. THOMAS,
} JUSTICES.

COMMONWEALTH *vs.* MUNROE THOMPSON.

Under an indictment for breaking and entering the shop of a person named, it is no variance, under Rev. Sts. *c.* 133, § 11, if it appears that the shop is occupied by that person and another, each of whom pays rent to the owner thereof, and by mutual agreement occupies a distinct part of the shop, although it is not shown that the defendant broke and entered the part occupied by the person named.

INDICTMENT for breaking and entering the shop of James Stubbs in the night time, and stealing therein.

At the trial in the court of common pleas, James Stubbs testified that he occupied the shop; and, upon cross-examination, that he was not the owner of the shop, but that the shop belonged to Elijah Cloyes; that he boarded with Cloyes, and paid him two dollars and fifty cents a week for his board and for

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the privilege of occupying one half of the shop for manufacturing shoes; that another man had the privilege of occupying one half of the shop, and the two arranged between themselves what part of the shop each should use. It did not appear whether the defendant broke and entered the portion of the shop actually used by Stubbs or not. The shop was a small shoemaker's shop, containing but one room.

Upon this evidence the defendant contended that there was a variance between the allegation and the proof of ownership in the shop. But *Sanger*, J. ruled that the ownership of the shop was properly laid in the indictment, and sufficiently proved, if the jury were satisfied beyond a reasonable doubt that Stubbs was at the time of the breaking and entering in the actual possession of any part of the shop. The jury found the defendant guilty, and he alleged exceptions.

C. R. Train, for the defendant, cited *Brown's case*, 1 East, P. C. 501; Roscoe Crim. Ev. "Burglary."

J. H. Clifford, (Attorney General,) for the Commonwealth, cited *Rex* v. *Jobling*, Russ. & Ry. 525; *Rex* v. *Jarvis*, 1 Moody, 7; *The King* v. *Witt*, 1 Moody, 248; *The King* v. *Margett*, 2 Leach, (4th ed.) 930; Rev. Sts. *c.* 133, § 11.

By the Court. The Rev. Sts. *c.* 133, § 11, expressly provide that in the prosecution of any offence, committed upon or in any way affecting any real estate, or committed in stealing any personal property, "it shall be sufficient, and shall not be deemed a variance, if it be proved on the trial that at the time when the offence was committed, either the actual or constructive possession, or the general or special property, in the whole, or in any part, of such real or personal estate," was in the person alleged in the indictment to be the owner thereof.

In this case, Stubbs and the other occupant of the shop had the possession of the whole shop, which was a detached building. They had not made any partition, but had merely agreed how they should use it. They were tenants in common, and therefore, by the statute, the shop might be described as the property of either. *Exceptions overruled.*

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Commonwealth *vs.* William Howe.
Same *vs.* Same & others.

Confessions made by one so intoxicated as not to understand them are no evidence of guilt.

Whether a party making confessions was so much under the influence of intoxicating liquor as not to understand what he was confessing is a question for the jury.

On the trial of an indictment for breaking and entering a shop and stealing therein, the only evidence against the defendant was his confession, made while under the influence of intoxicating liquor, that he and another person broke into the shop and stole the goods described, and that the defendant sold part of the goods to a third person. *Held*, that the defendant might introduce evidence to disprove all the facts which he was said to have confessed.

If the question whether a defendant, when making confessions of guilt, was so intoxicated as not to understand them, is submitted to the court as preliminary to the admission of a witness to the confessions, and is decided by the court upon the testimony of that witness only, rejecting evidence of other witnesses that shortly before and after the conversation at which the confession was made the defendant was intoxicated, it is ground of exception.

Indictments for breaking and entering shops and stealing shoe stock therein. Trials in the court of common pleas before *Aiken*, J.

In the *first* case the only evidence to connect the defendant with the breaking and entering was testimony of one Colbath that the defendant told him that he, together with George Parmenter, (who had been jointly indicted with him, but against whom a *nolle prosequi* had been entered,) broke and entered the shop and stole the stock as alleged in the indictment, and that Howe sold his share of said stock, so stolen, to Emery Cobb. Colbath also testified to facts tending to show that Howe, when he made these confessions, was more or less under the influence of liquor.

The defendant requested the court to rule that the confessions, being made by a man intoxicated, were not competent evidence. But the court declined so to rule; and did rule "that the evidence of intoxication was only to be considered by the jury, in determining what weight was to be given to the confessions of the defendant as evidence; that if they found he was so much under the influence of liquor as not to understand

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what he was confessing, they ought to disregard the confession as evidence altogether; and that the burden was upon the government to show the confession was voluntary."

The defendant then offered to show that Parmenter did not break into the shop or aid in stealing the stock; and that Howe did not in fact sell to Cobb any portion of the stock, or any other shoe stock. But the court ruled that the testimony was incompetent.

The proceedings in the *second* case were substantially similar, except as follows: "The government produced Colbath as a witness in order to prove certain confessions said to have been made to him by Howe. The defendants objected that that confession was made, if at all, at a time when Howe was not in possession of his senses from the use of intoxicating liquor; and with the permission of the court, as a preliminary question to the court, cross-examined the witness as to the state and condition of Howe when said confessions were supposed to have been made. Colbath testified to certain facts, in his cross-examination, tending to prove that at the time said confessions were made Howe had been drinking, as the witness thought, to excess; but the witness thought Howe knew what he was about.

"The defendants then offered to call other witnesses, who were not present at the conversation, to prove that shortly before and after the time of the conversation with Howe, testified to by Colbath, Howe was drunk and not in possession of his senses. But the court refused to hear the testimony, and, after argument upon the testimony given by Colbath, ruled that if intoxication had been so far proved by the testimony of Colbath as to satisfy the court that Howe had not been in possession of his senses, it would reject the evidence of confession as incompetent; but that it was not satisfied from the testimony of Colbath that such was the case, and should permit the evidence to go to the jury."

The jury in each case returned a verdict of guilty, and the defendants excepted.

B. F. Butler & N. St. J. Green, for the defendants.

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J. H. Clifford, (Attorney General,) for the Commonwealth, to the point that the sufficiency of the evidence of intoxication in the second case was within the discretion of the presiding judge, and not a matter of exception, cited *Davis* v. *Maxwell*, 12 Met. 286.

THOMAS, J. In the *first* case, the *corpus delicti* being shown, the evidence to connect the defendant with the offence is that of his own confession. In relation to the confession two questions arise:

1. Evidence having been given tending to show that when the confessions were made the defendant was more or less under the influence of liquor, the court was requested to instruct the jury that the confessions, being made by a man intoxicated, were not competent evidence. This prayer assumed the question of fact.

The court instructed the jury that the evidence of intoxication was an objection to the weight and not to the competency of the testimony; and that if the defendant was so much under the influence of liquor as not to understand what he was confessing, they should disregard the confessions altogether. These instructions were entirely right. See *Rex* v. *Spilsbury*, 7 Car. & P. 187.

2. The confessions of which evidence was given embraced in substance three facts: first, that the defendant broke and entered a shop; second, that George Parmenter was with him in so breaking and entering; third, that the defendant sold the stock stolen to Emery Hobbs.

The defendant offered evidence to show that the confessions were not true; that the facts did not occur as in the confessions stated. This evidence was rejected. We think it should have been admitted; that the defendant was not to be concluded by any confessions made, much less by the statements of witnesses that confessions had been made. It was competent to show that the facts could not have taken place as alleged, or did not; especially is this the case where there is evidence leaving it doubtful whether the defendant was in a condition to understand what he was confessing.

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The *second* case is distinguished from the first only in this respect: The court admitted evidence from a witness testifying to the confessions of the defendant as to the condition of the defendant at the time the confessions were made; but declined to hear evidence from other witnesses as to the state the prisoner was in before and after the confessions were made. This was erroneous. If the judge was to hear the evidence, and determine the mental condition of the defendant when the confessions were alleged to have been made, he should hear all the competent evidence. The more correct course would have been to submit the confessions with the whole evidence to the jury.

Exceptions sustained in both cases.

COMMONWEALTH *vs.* HARRIET M. BARHIGHT.

A complaint for larceny, signed by the complainant below the description of the goods stolen, and above the charge of larceny, is not "subscribed by the complainant" as required by the Rev. Sts. c. 135, § 2.

COMPLAINT for larceny, signed by the complainant in the blank space below the description of the goods stolen, and above the charge of larceny; and certified by the clerk of the police court of Lowell to have been received and sworn to before that court.

The defendant, after conviction in the court of common pleas, moved in arrest of judgment, because the complaint was not "subscribed by the complainant," as required by the Rev. Sts. c. 135, § 2. *Perkins*, J. overruled the motion, and the defendant excepted.

T. H. Sweetser, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth. "Subscribed" is not necessarily at the foot of the complaint. If the signature is so placed as to have the effect of authenticating the instrument, it is immaterial in what part it is. In this

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case the jurat verifies the complaint in all its essential parts as having been made by the complainant. 2 Kent Com. (6th ed.) 511, & cases cited. *James* v. *Patten*, 8 Barb. 344. *Penniman* v. *Hartshorn*, 13 Mass. 87. Rev. Sts. *c.* 62, § 6.

Shaw, C. J. The magistrate is required to reduce the complaint to writing, and "cause the same to be subscribed by the complainant." Rev. Sts. *c.* 135, § 2. It is not certain that this complaint was reduced to writing before it was sworn to. It cannot be ascertained that this signature was made for the purpose of authenticating the whole complaint. The cases cited, relating to the attestation of wills and the signing of memoranda under the statute of frauds, do not apply. Such looseness and carelessness in instituting criminal proceedings are not to be encouraged. *Judgment arrested.*

Commonwealth *vs.* Alexander McKenney.

An indictment for larceny of property alleged to be of a value less than one hundred dollars is supported by evidence that the property was of any value.

The punishment which may be imposed by the court of common pleas, under Rev. Sts. *c.* 126, § 17, for larceny of property not exceeding one hundred dollars in value, is not affected by the value of the property, notwithstanding the concurrent jurisdiction given by § 18 to justices of the peace where the value is not alleged to exceed fifteen dollars.

On the trial of an indictment for larceny of a horse the jury are warranted in finding that he is of some value upon evidence that he was a dark sorrel horse, weighing about nine hundred pounds, had a long tail, and was driven a long distance.

Indictment for the larceny of a horse alleged to be of the value of seventy five dollars. Trial and conviction in the court of common pleas before *Aiken*, J., who signed this bill of exceptions:

"Upon the trial the prosecutor testified that his horse was a sorrel horse, weighed about nine hundred pounds, had a long tail, and had a bruise upon one hip; and was taken from Stowe in this county on the 12th of October 1856; and that he found said horse at Portsmouth, N. H., on the 22d or 23d of October, and drove him home to Stowe. One Somerby testified that he

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kept a stable in said Portsmouth; that on the 15th of said October the defendant came to his stable in Portsmouth with said horse, and had him put up, and said he intended to sell him and some other property at auction the next morning, and, when said property was sold, would pay his bill for the keeping of said horse; and took said horse away the next morning to sell him. No other evidence of value was offered by the government.

"The defendant objected that there was no proof of the value of said horse, which was a material allegation in the indictment; and that, in order to convict the defendant, the government must prove some value to the animal; and that the defendant would be found guilty of a misdemeanor or a felony as the value of the animal was found by the jury.

"The court instructed the jury that the government must prove some value, but need not prove the value alleged in the indictment; that from the evidence aforesaid they might infer some value, if the evidence satisfied them of value; and that the evidence was competent for that purpose; that it was immaterial, if the jury found the horse of some value, whether it was one cent or a larger sum; that either would justify a general verdict of guilty, if the other facts were proved to their satisfaction; that the jury need not find any given sum as value, provided they were satisfied from the evidence that the horse was of some value.

"The jury returned a verdict of guilty. To these several instructions and rulings the defendant excepts."

B. F. Butler, for the defendant, cited Rev. Sts. *c.* 126, § 18; *Sts.* 1849, *c.* 132, § 2; 1852, *c.* 4; 1855, *c.* 448, § 1; 1857, *c.* 157, § 1; *Hope* v. *Commonwealth*, 9 Met. 136.

J. H. Clifford, (Attorney General,) for the Commonwealth, cited *St.* 1804, *c.* 143; Rev. Sts. *c.* 82, § 25; *c.* 126, § 17; *Commonwealth* v. *Nolan*, 5 Cush. 288; *Regina* v. *Morris*, 9 Car. & P. 349.

Dewey, J. To constitute larceny, the property taken must be of some value. An indictment omitting to allege that the property was of value would be a bad indictment. But upon

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the trial of the case the government is not bound to prove the precise value as stated in the indictment. Proof of a larger value would be equally well, and would in no respect change the extent of the punishment authorized by the statute, as the value stated in the indictment would be the highest value that could be made the basis of the punishment.

If the indictment had alleged the value of the property stolen to exceed one hundred dollars, it would have been quite material to have the jury pass upon that question, if the value was in controversy, as it might materially affect the rights of the defendant in matter of punishment. The Rev. Sts. *c.* 126, § 17, recognize, with reference to simple larcenies and their punishment, two classes of cases only; first, those where the property stolen exceeds the value of one hundred dollars; and secondly, cases where the value of the property does not exceed one hundred dollars. The jurisdiction of the cases under the provisions of § 17 is wholly in the court of common pleas, in all the counties except Suffolk, where a municipal court exists with the same powers, and the punishment therein authorized cannot be inflicted by a justice of the peace. Rev. Sts. *c.* 82, § 25. As to cases pending in the court of common pleas upon indictment there found, there are the two grades of punishment already alluded to, and none other. If the value is less than one hundred dollars, it falls in the lowest grade. But all values under one hundred dollars are of this class, and may be punished by the like punishment, leaving a discretion with the court in each case of modifying the punishment, as the aggravating or mitigating circumstances may require, but not being restrained by the smaller or larger amounts of the value of the articles.

It was urged at the argument of this case, that by the provisions of § 18, another grade of larceny was created, and that the larcenies named in § 17, if the value of the property did not exceed fifteen dollars, and all other larcenies where the value of the property did not exceed five dollars, might be punished by a less severe punishment.

A careful reading of § 18 will show that all its provisions have reference to the jurisdiction of justices of the peace,

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giving them an original concurrent jurisdiction with the court of common pleas in the cases specified in that section, and restricting them to punishments less severe, but not intended in any manner to affect the extent of punishment which the court of common pleas is authorized to inflict in cases of original jurisdiction in that court. That § 18 is wholly restricted to cases originating before a justice of the peace is apparent further from the provisions as to punishment for a second conviction of the like offence committed after the former conviction before the justice, and more especially by the concluding sentence of § 18, applying to all the previous provisions in that section as to punishments, "saving to every person so convicted the right to a trial by jury upon his appeal." Its whole provisions are exclusively confined to cases where the property stolen "shall not be alleged" to exceed fifteen dollars in value, and cannot by their own phraseology be applied to a case where the property is alleged to be of the value of seventy five dollars.

We are aware that this construction of the statute gives the court of common pleas the power to punish a simple larceny under fifteen dollars more severely than a justice of the peace can do, thus apparently subjecting a criminal to a possible severe punishment or a milder one, as he may happen to be originally prosecuted in the higher or lower court. This is so, but it is no modern law, but has been so from the time of the adoption of the first constitution. It is distinctly found in *St.* 1784, *c.* 66. It was reënacted in the *St.* of 1804, *c.* 143, in terms too plain to afford ground for a doubt, the powers of the court being distinctly stated as to punishment on convictions in the particular court. Prior to the transfer from this court of the jurisdiction of all criminal cases, not capital, to the court of common pleas, there were three courts having concurrent jurisdiction of many offences of the smaller grade, in reference to which the extent of the punishment that might be inflicted for the same offence was materially different in each of these courts, giving the power in its most restricted form to justices of the peace, a greater range of punishment to the court of common

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pleas, if the party was there indicted, and a still greater punishment might be awarded by the supreme judicial court, if the indictment was found in that court. Practically, the result has been that nearly all cases of larceny are originally examined before a justice of the peace, or a police court with like jurisdiction. If, upon such examination, the value of the property is under fifteen dollars, and there are no aggravating circumstances in the case, the justice finally determines the case and inflicts the punishment provided in § 18. But if the party is indicted in the court of common pleas in the first instance, the case is tried under § 17. It is to be observed that the punishment may in such case, if in the opinion of the court of common pleas it be proper, be mitigated to the smallest fine or term of imprisonment, there being no restriction as to this.

The result of this view of the statutes is this; that when in the indictment the alleged value of the property stolen exceeds one hundred dollars, upon a trial thereof the defendant may deny the value to be truly alleged, and if he does so, the jury will be required to find the same by their verdict, if they find a verdict of guilty; but when in the indictment the alleged value of the property does not exceed one hundred dollars, it is not essential that the jury find by their verdict any precise sum as the value of the property. It is enough that the article stolen was of some value, and, that fact being essential to constitute a larceny, the general verdict of guilty must necessarily include the finding of value to the property alleged to be stolen.

The evidence in the present case, as to the nature of the property taken by the defendant, was sufficient to authorize the jury to find the same to be of some value, and the instructions of the court of common pleas were proper upon this point.

Exceptions overruled.

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Commonwealth *vs.* James Monahan.

An indictment for perjury by testifying upon the trial of a complaint for an assault upon this defendant, that the person complained of did not assault him on a day named, whereas in fact, as this indictment alleged, he did so assault him on that day, is not supported by evidence that this defendant testified as alleged, and that he was so assaulted either on the day named or the day before.

Dewey, J. The allegations in the count of the indictment upon which the jury have returned a verdict of guilty are that on the trial of Andrew McEvoy for an assault and battery upon the defendant, it became and was a material inquiry on the issue whether the said Andrew McEvoy, at Lowell, on the tenth day of September 1856, did assault, beat, wound and ill treat the defendant, and whether the said Andrew McEvoy at any time in said September did assault, beat, wound and ill treat the defendant; and that the defendant on said trial did testify that he was not assaulted by said Andrew McEvoy on said tenth of September, and that he was not assaulted and beaten by the said Andrew McEvoy at any time in September, meaning the month of September 1856; and the indictment further alleges, by way of negativing the testimony of the defendant, and specially assigning perjury, "that in truth, and in fact, the said Andrew McEvoy, at said Lowell, on said tenth day of September in the year aforesaid, with force and arms did assault the defendant, and him did then and there, to wit, on said tenth day of September, strike, kick, beat and wound." No other portion of the testimony is negatived by the indictment than what is above stated.

The proof offered by the government, tending to show that an assault and battery was actually committed by Andrew McEvoy upon the defendant, did not establish the fact that it was on the tenth day of September, but that it was on the ninth or tenth day of September. Upon this state of the evidence, the counsel for the defendant, on the trial in the court of common pleas, requested the court to instruct the jury that they could find the defendant guilty in relation to that testi-

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mony only of the defendant, the truth of which was specially negatived in the manner stated above. But the presiding judge, after stating that the proof offered by the government of the falsity of the defendant's testimony must substantially correspond with and sustain the negativing portion of the indictment above set out, further ruled and instructed the jury "that it was immaterial whether the assault and battery was shown to have been committed on the ninth or the tenth of September."

To this last instruction exceptions were taken, and the court are of opinion that they must be sustained. The government might in the indictment have negatived the entire testimony of the defendant, as well that wherein he testified that McEvoy did not assault and beat him at any time in September, as the testimony that McEvoy did not assault and beat him on the tenth day of September. But in fact the Commonwealth only negatived his testimony that he was not assaulted by McEvoy on the tenth of September. The whole charge of perjury was thereby restricted, and the government was bound to show that this particular statement of his was false. But showing that he was assaulted by McEvoy on the ninth of September did not disprove his testimony that he was not assaulted on the tenth of September. Both these statements might be true, and proving one of them to be so did not falsify the other.

If it be said that the precise day of committing the assault and battery, and whether it was on the ninth or tenth of September, was immaterial on the trial of the complaint against McEvoy for the assault and battery, that is clearly so, as the precise time stated in the indictment need not have been proved on such a trial. But it is not so in this indictment for perjury. The allegation here is that the defendant swore falsely in testifying that McEvoy did not assault him on the tenth of September. The day thus becomes material, and the negation of this testimony is not sustained by proving that the defendant was assaulted by McEvoy on the ninth of September.

The ruling and instruction to the jury being wrong upon this point, the verdict must be set aside and a new trial had Upon

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the other questions raised it is unnecessary at this time to express any opinion, as the facts may be different on a future trial. *Exceptions sustained.*

T. H. Sweetser, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

COMMONWEALTH *vs.* STEPHEN CASTLES.

On the trial of an indictment for obtaining a signature to a deed by false pretences, previous conversations of the defendant with a third person as to procuring such a signature are admissible in evidence against him.

The admission of other proof of the execution of a deed is no ground of exception by a party who subsequently calls and examines the subscribing witness.

INDICTMENT for obtaining the signature of John Walsh, Jr. to a mortgage deed to the defendant, upon false pretences that it was a mortgage deed to his father John Walsh, Sen.

At the trial in the court of common pleas, *Sanger*, J. permitted Walsh, Sen., against the defendant's objection, to testify, as part of the proof of the false pretences, to a conversation, in the absence of his son, between himself and the defendant, before the time of obtaining the signature as alleged, in which the defendant advised the witness, in order to prevent the foreclosure of an existing mortgage on his farm, to convey his farm to his son and have his son mortgage it back to him, to which the witness assented, and the defendant then said that he would get the writings drawn by a lawyer.

The witness further testified that a few days afterwards he and his son met the defendant, and asked him if he had those papers made out; that he said he had, and asked them to wait a few minutes, and he would go and see if the lawyer was in his office; that he went, and in a few minutes came back, and said he was; and the three went there together; that the lawyer asked the witness if he was going to convey his farm to his son, and he assented; and the lawyer handed one paper to him, and two to his son, which they signed, without reading them,

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and, at the defendant's request, left them with the lawyer to have them recorded, and went back to the defendant's shop.

John Walsh, Jr., being also called as a witness, was permitted by the court, against the defendant's objection, to identify the two papers signed by him, and to testify to their execution, without the attesting witness (who was the lawyer who drew the papers) being first called.

The attesting witness was subsequently called by the defendant, and testified in regard to the circumstances attending the execution of the mortgage.

The defendant, being convicted, alleged exceptions.

T. H. Sweetser, for the defendant. 1. What the defendant said to Walsh, Sen., not having been said to the person alleged to have been defrauded by false pretences, nor communicated to him, could not have induced him to sign the deed, and its admission tended to prejudice the jury. *Commonwealth* v. *Call*, 21 Pick. 523. *Ellis* v. *Short*, 21 Pick. 142. *Commonwealth* v. *Bosworth*, 22 Pick. 400.

2. The Commonwealth should have been required to prove the execution of the deed in the usual manner by the attesting witness. 1 Stark. Ev. (4th ed.) 327, 331, 475.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Bigelow, J. The conversation of the defendant with Walsh, Sen., prior to the making of the false pretences charged in the indictment was admissible as showing the *animus* with which the defendant acted in consummating the alleged fraudulent transaction. It was in the nature of a confession or admission, and although it did not tend directly to prove the false pretences charged, yet it related to the subject matter about which the false pretences were subsequently made by the defendant. It was in fact the inducement or prelude to the fraudulent transaction, and part of the *res gestæ*, which led to the criminal act.

It is not necessary to determine whether the ruling, permitting the deed to be read in evidence without the testimony of the subscribing witness, was correct or not. There is authority for the position that, when a deed or instrument in writing is intro-

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duced in evidence collaterally or incidentally, in proceedings between persons not parties to it, and when it is not offered as part of a chain of title, it is not necessary to prove it by the evidence of the subscribing witness. See *Curtis* v. *Belknap*, 21 Verm. 433. In the present case, however, the ruling on this point became wholly immaterial, because the subscribing witness was actually called at a subsequent stage of the trial, and testified to all the circumstances attending the execution of the deed. The defendant therefore had ample opportunity to examine him on the subject. *Exceptions overruled.*

COMMONWEALTH *vs.* STEPHEN CASTLES.

An indictment, either at common law, or under the Rev. Sts. c. 127, § 2, for uttering as true a forged indorsement of a promissory note, which sets forth the note and indorsement according to their tenor, need not describe the instrument as a promissory note "for the payment of money."

INDICTMENT, averring that the defendant on the 15th of November 1852 at Lowell "had in his custody and possession a certain promissory note signed by the said Stephen Castles and payable to John Walsh or order, and then and there purporting to have been indorsed by the said John Walsh on the back thereof, which said promissory note is of the tenor following, that is to say,

"'Lowell, Nov. 15th 1852. $2000. Value received, I promise to pay John Walsh or order two thousand dollars in one year. Stephen Castles.'

"And the said indorsement on the back of said promissory note was then and there of the tenor following, that is to say, 'Waiving demand and notice. John Walsh.' And the said indorsement of the name of said John Walsh was then and there false, forged and counterfeit; and the said Stephen Castles did then and there utter and publish as true said promissory note with the indorsement aforesaid thereon, and did then and

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there utter and publish as true the said indorsement so on the back of said note as aforesaid, he the said Stephen Castles then and there well knowing said indorsement of the name of said John Walsh to be false, forged and counterfeit, with intent then and there to defraud."

The defendant, after conviction in the court of common pleas, moved in arrest of judgment, because the promissory note the indorsement on which was alleged to have been forged was not described as "a promissory note for the payment of money;" and, the motion being overruled, alleged exceptions.

T. H. Sweetser, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Bigelow, J. It is not necessary that the indictment should in terms aver that the forgery charged was of the "indorsement of a promissory note for the payment of money." These, it is true, are the words of the statute. Rev. Sts. *c.* 127, § 2. But it is not essential that they should be used in the indictment. It is sufficient if it appears on the face of the indictment by proper averments that the instrument forged is of the particular kind prohibited by statute. Or if it can be collected from the forged writing itself, as set out in the indictment, that it assumes to be an instrument the false making of which is forgery. 1 Stark. Crim. Pl. (2d ed.) 104, 105. 2 Stark. Crim. Pl. 513. 1 Chit. Crim. Law, 234. Archb. Crim. Pl. (10th ed.) 355. In the present case, the note on which the indorsement is alleged to have been forged is set out according to its tenor; by which it clearly appears that it was in fact a promissory note for the payment of money. The indictment conforms to the well established precedents.

But if this were not so, it would not follow that the indictment was bad. If it did not sufficiently aver a forgery of an instrument within the statute, it might nevertheless be good as charging the offence of forgery at common law. *Commonwealth* v. *Ayer*, 3 Cush. 150. *Commonwealth* v. *Ray*, 3 Gray, 441.

Exceptions overruled.

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Commonwealth *vs.* Gideon W. Nason.

An indictment charging a false pretence that a false coin was a good and current gold coin, and that the person to whom the pretence was made, being deceived thereby, was thereby induced to receive the same as a good and current gold coin, and to deliver to the defendant in exchange therefor certain bank bills and silver coin, described, sets forth the contract with sufficient certainty.

Indictment on Rev. Sts. *c.* 126, § 32, alleging that the defendant on the 4th of October 1856 at Lowell, "devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels, effects and personal property of the honest and good citizens of this commonwealth, and with intent then and there to cheat and defraud, did then and there unlawfully, knowingly and designedly, falsely pretend and represent to one Abel Parker that a certain metallic medal and substance, which he the said Gideon W. Nason then and there had, was a good and current gold coin, called an eagle, of the gold coin current in the commonwealth aforesaid by the laws and usages thereof, and was then and there of the value of ten dollars; and the said Gideon W. Nason did then and there deliver said metallic medal and substance to the said Abel Parker as and for a good and current gold coin of the money current in said commonwealth and of the value of ten dollars. And the said Abel Parker, then and there believing the said false pretences and representations, so made as aforesaid by the said Gideon W. Nason, and being then and there deceived thereby, was then and there induced by reason of the false pretences and representations so made as aforesaid to receive the said metallic medal and substance as and for a good and current gold coin current in said commonwealth by the laws and usages thereof, called an eagle; and was induced by the false pretences and representations, so by the said Gideon W. Nason then and there made as aforesaid, to deliver and did then and there deliver to the said Gideon W. Nason, in exchange for said metallic medal and substance, sundry bank bills current in said commonwealth by the laws and

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usages thereof, amounting together to the sum of nine dollars and then and there of the value of nine dollars, and sundry pieces of silver coin current in said commonwealth by the laws and usages thereof, amounting together to seventy cents and then and there of the value of seventy cents, of the moneys of him the said Abel Parker. And the said Gideon W. Nason did then and there unlawfully, knowingly and designedly receive and obtain the said moneys of the said Abel Parker by means of the false pretences and representations aforesaid, and with intent then and there to cheat and defraud the said Abel Parker of the said moneys. Whereas in truth and fact the said metallic medal and substance was not then and there a good and current gold coin called an eagle, of the gold coin current in said commonwealth by the laws and usages thereof, and was not then and there of the value of ten dollars, but was then and there of little value, to wit, of the value of five cents, all which he the said Gideon W. Nason then and there well knew." And that the defendant by means of said false pretences received the said moneys of said Parker, with intent to defraud him of the same.

The defendant, being convicted in the court of common pleas, moved in arrest of judgment, that no offence was alleged in the indictment. *Sanger*, J. overruled the motion, and the defendant excepted.

W. S. Gardner, for the defendant. This indictment does not set forth any bargain between Parker and the defendant, and offer or request to exchange property or money between them, or any inducement held out by the defendant to Parker to part with his goods or money. Judgment must therefore be arrested. *Commonwealth* v. *Strain*, 10 Met. 521.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Shaw, C. J. This indictment is good. It sets forth an exchange, which is not only a contract, but a contract executed, like a sale. It is distinguishable in this respect from *Commonwealth* v. *Strain*, relied on by the defendant.

Exceptions overruled.

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Commonwealth *vs.* Peter Prius & another.

An indictment averring that two partners agreed and conspired to procure over-insurance upon their stock in trade to a certain amount "by falsely pretending that said stock was of much greater value than" that amount, and, as a part of that agreement, agreed and conspired to obtain that amount from the insurers as and for a loss, "by means of false pretences of a loss thereafterward to happen, with design, under pretence of a loss, to cheat and defraud" the insurers "of their moneys by means of said false pretences," without more particularly stating the means by which the money was to be obtained, is insufficient.

The second count of this indictment alleged that the defendants, on the 1st of March 1856, owning a stock of goods in Lowell as partners, and having insurance thereon against fire by certain insurance companies named in the indictment, amounting in all to the sum of $10,000, "did then and there corruptly, wickedly and unlawfully confederate, agree, combine and conspire together, to insure and cause to be insured on said stock" certain other sums, amounting to $10,000 more, in other companies named, "by then and there falsely pretending that said stock so by said firm kept and used in their said business was then and there of a much greater value than twenty thousand dollars; and as a part of said unlawful agreement" the defendants "did then and there corruptly, wickedly and unlawfully confederate, agree, combine and conspire together to obtain from all said insurance companies as and for a loss to a large amount, to wit, twenty thousand dollars, by means of false pretences of a loss thereafterward to happen, with design, under pretence of a loss, to cheat and defraud all said insurance companies and each one of them of their moneys by means of said false pretences; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

The defendants, being convicted in the court of common pleas on this count, moved in arrest of judgment, that no offence was alleged therein. *Sanger*, J. overruled the motion, and the defendants alleged exceptions.

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T. Wentworth & P. Haggerty, for the defendants.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Bigelow, J. The second count in the indictment, on which alone the defendants were found guilty, is fatally defective. It was not a crime in the defendants to procure an over-insurance on their stock in trade. It was at most only a civil wrong. The charge of a conspiracy to do so does not therefore amount to a criminal offence. It was not a combination to effect an unlawful purpose, and no unlawful means by which the purpose was to be effected are set out in the indictment.

The residue of the count is too uncertain and indefinite to support a conviction. It amounts to nothing more than an allegation of a conspiracy to cheat and defraud the insurance companies, which is clearly insufficient. *Commonwealth* v. *Shedd*, 7 Cush. 514. The means by which this purpose was to be effected are not stated with such precision and certainty as to show that they were unlawful. The false pretences by which money was to be obtained from the insurance companies are not set out; and the charge of a conspiracy "to obtain money by means of false pretences of a loss thereafterward to happen," is altogether too general and vague a statement to come within the rules of criminal pleading. *Judgment arrested.*

Commonwealth *vs.* Ethan A. Crawford.

A complaint on *St.* 1855, *c.* 429, which alleges that on Saturday the 2d of August the defendant did keep a billiard room, and "did then and there" suffer certain persons to play at billiards in said room "after the hour of six of the clock in the afternoon of" said Saturday, sufficiently defines the time.

Complaint on *St.* 1855, *c.* 429, which imposes a punishment on "the keeper, for the time being, of any billiard room or table, who shall suffer any persons to play at the same after six o'clock in the afternoon of Saturday, or after ten o'clock in the afternoon of any other day."

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The complaint alleged that the defendant, "on Saturday the second day of August in the year eighteen hundred and fifty six," at Stoneham, did keep a billiard room, "and was then and there the keeper of said billiard room, and did then and there unlawfully and wilfully permit and suffer" certain persons "to play at billiards in said billiard room after the hour of six of the clock in the afternoon of Saturday the second day of August aforesaid."

The defendant, being convicted in the court of common pleas, moved in arrest of judgment, for uncertainty of the complaint, in not showing that the suffering certain persons to play at billiards, alleged to have been after six o'clock in the afternoon of a Saturday, was before midnight of the Lord's day following. *Perkins*, J. overruled the motion, and the defendant alleged exceptions.

P. Haggerty, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

By the Court. The allegation that the defendant permitted certain persons to play at billiards "after the hour of six of the clock in the afternoon of Saturday the second day of August aforesaid," which, if it stood alone, might be open to the objection of not showing that it was not on any day of the ensuing week, is explained by the previous statement "on Saturday the second day of August" 1856. *Exceptions overruled.*

Commonwealth *vs.* Ethan A. Crawford.

It is no defence to a complaint for selling intoxicating liquor "to a person whose name is to your complainant unknown," that at the time of making the complaint the complainant's only knowledge of the offence was by information from others.

Complaint on St. 1855, *c.* 215, § 15, for selling intoxicating liquor "to a person whose name is to your complainant unknown."

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At the trial in the court of common pleas before *Aiken*, J., the complainant testified "that another person told him that the defendant had been selling liquor, and that evidence could be adduced to prove it; and thereupon the complainant made said complaint." The complainant also testified "that, when he signed said complaint, he neither knew, nor had he been informed of the person, or the name of the person, to whom the supposed sale had been made; neither did he know, or have any idea, of the name of the person to whom such supposed sale had been made; nor did he have in his mind any particular transaction; nor did he know what evidence there was to support said complaint." Another witness testified that he had purchased intoxicating liquor of the defendant.

The defendant requested the court to rule, "that when the complainant signed the complaint, it was necessary that he should either know the person, or the name of the person, to whom the supposed sale had been made, or should have in his mind or be capable of identifying such person."

The court declined so to rule; but did instruct the jury "that if the complainant knew, or had reasonable and probable cause to know by information from others, that the sale had been made by the defendant, but did not know the name of the person to whom such sale was made, the jury would be warranted in finding the allegation of a sale to a person whose name was unknown, proved; and, provided they were satisfied that a sale had been made, would return a verdict of guilty." The defendant was convicted, and alleged exceptions.

J. P. Converse, for the defendant. The twelfth article of the Declaration of Rights, providing that "no subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him," requires the act, and not merely the kind of act, to be set forth. And on appeal from the judgment of an inferior court, the defendant has a right to have his trial confined to the same act for which he has been tried in that court. If a complainant, or a grand jury, has not in mind any particular transaction, the defendant may be arraigned for an offence with which he has not been

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charged, and tried for an offence on which he has not been arraigned. Rev. Sts. *c.* 135, § 2. *Commonwealth* v. *Blood*, 4 Gray, 31.

J. H. Clifford, (Attorney General,) for the Commonwealth.

By the Court. When the person to whom the sale is made is unknown, it may be so alleged. *Commonwealth* v. *Hendrie*, 2 Gray, 504. This complainant had been informed that the defendant had committed the offence charged, and he made oath to the complaint in due form. It was not necessary that at the time of making the complaint he should know the particulars of the transaction, or the name of the person to whom the sale was made.

After the defendant had been tried and convicted before a justice on proof of a sale at a certain time and place, evidence of a sale at a different time and place would be inadmissible in the higher court. But if the offence was well charged and was proved as laid, the legal presumption is *prima facie* that it was the same offence. *Exceptions overruled.*

Commonwealth *vs.* Thomas Woods.

An indictment, which avers that the defendant at a certain place on a certain day, and at said place from said day to the day of finding the indictment, "was then and there a common seller of intoxicating liquors," charges but one offence.

Indictment on *St.* 1855, *c.* 215, § 17, averring that the defendant, "at Hopkinton in the county of Middlesex on the first day of January in the year one thousand eight hundred and fifty six, and at said Hopkinton from said last mentioned day to the day of finding this indictment, without then and there having any license, appointment or authority therefor first duly had and obtained according to law, was then and there a common seller of intoxicating liquors."

The defendant, after conviction in the court of common pleas, moved in arrest of judgment, that the indictment was bad for duplicity. *Aiken*, J. overruled this motion, and the defendant alleged exceptions.

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C. R. Train, for the defendant. The indictment is uncertain in charging the defendant with being a common seller on a day certain, and again under a *continuando*. Both are pleaded with time and place. Had the words "at said Hopkinton" been omitted, the indictment might possibly have been held good.

J. H. Clifford, (Attorney General,) for the Commonwealth.

METCALF, J. This indictment charges only a single offence, namely, that the defendant was a common seller of intoxicating liquors, at Hopkinton, on the first day of January 1856, and from that day to the day of the finding of the indictment, without any license, appointment or authority therefor duly obtained. And this form of charge has been decided to be sufficient and proper. *Commonwealth* v. *Pray*, 13 Pick. 359. *Commonwealth* v. *Wood*, 4 Gray, 11. In the second of these cases, the indictment was precisely like that in the present case; that is, the place where the offence was committed was inserted twice; once when alleging a day certain, and again when alleging divers subsequent days. This repetition was doubtless unnecessary, but it was not improper, and there is no ground for the objection that two offences are thereby alleged in the indictment. We express no opinion whether duplicity, when found in an indictment, is cause for arresting judgment.

Exceptions overruled.

COMMONWEALTH *vs.* THOMAS BURNS.

The provision of *St.* 1855, *c.* 215, § 17, that three several sales of spirituous or intoxicating liquor shall be sufficient evidence of a violation of this section is constitutional and valid, and subjects a person making three such sales to the penalties of a common seller.

INDICTMENT on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors at Marlborough on the 1st of June 1856, and from that day to the 1st of October 1856.

At the trial in the court of common pleas, *Aiken*, J. instructed the jury "that three several sales were sufficient evidence of the

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violation of the statute; and that the provision that three several sales of intoxicating liquor should be sufficient evidence of a violation of this statute was constitutional." The jury convicted the defendant, and he excepted to the above rulings.

C. R. Train, for the defendant. A "common seller" is one who commonly and habitually sells intoxicating liquor; not one who merely makes three sales, months or years apart. The provision of *St.* 1855, *c.* 215, § 17, that "three several sales of spirituous or intoxicating liquors shall be sufficient evidence of a violation of this section," is beyond the constitutional power of the legislature. What shall be sufficient evidence is to be determined by the jury. If the legislature had enacted that three sales should make a party liable to the penalties of a common seller, they might have done what they intended.

J. H. Clifford, (Attorney General,) for the Commonwealth, submitted the case without argument.

By the Court. The *St.* of 1855, *c.* 215, § 17, provides that "three several sales of spirituous or intoxicating liquors, either to different persons or to the same person, shall be sufficient evidence of a violation of this section." This amounts to a definition that three sales shall satisfy the phrase "common seller," within the meaning of this act, and is equivalent to saying that whoever is guilty of making three sales shall be punished in the same manner as a common seller.

Exceptions overruled

Commonwealth *vs.* Grace Lawrence.

On the trial of a criminal case, the jury, some of whom had at the same term tried other similar cases, during the trial of which law books had been read to the jury by permission of the court, were instructed that they might bring to their aid in deciding on the evidence any knowledge they had acquired from any source equally open to them all, but not any particular knowledge as to the law or the facts communicated to a part of them only; and that they were to decide this case on the evidence introduced into it, and not on any evidence of the law or facts introduced into other cases in which some of them did not sit; and that the jury were bound to consider the instructions of the court on the law of the case as evidence of the law, and that they must decide the case according to the evidence. *Held*, **that the defendant had no ground of exception.**

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Complaint for selling intoxicating liquors in violation of St. 1855, c. 215, § 15. Trial in the court of common pleas at October term 1855, before *Perkins*, J. Eleven of the jurors had tried other similar cases at the same term, in which books of authority, statutes, repealed and in force, and the Constitution of Massachusetts, had been read and commented on by the defendant's counsel and the district attorney without objection. But no evidence of the law was introduced in this case before the instructions of the court.

The defendant requested the court to instruct the jury "that they had a right to bring to their aid in the decision of this case all the knowledge of general and constitutional law which they might have obtained from whatever source; that they might also bring to their aid, in making up their decision upon the law and the facts in this case, such knowledge as they may have obtained from books of authority in the law, which had been read to them by permission of the court in other previous cases like this;" and "that they had the right to decide by a general verdict the law and the facts in the case; that it was the duty of the court to aid and instruct the jury upon all matters of law arising during the trial; that the jury are not bound in their verdict to decide the law in accordance with the opinion of the court, and that the instructions of the court as to the matters of law involved in the issue are not conclusive evidence of the law in the case."

The court declined to give these instructions in this language; but did instruct the jury, "that they had the right to bring to their aid, in deciding upon the evidence in this case, all the knowledge they had acquired and all the information they had derived from any sources equally open to the observation of all; but that any particular information or knowledge, which had been communicated to portions of the jury from sources not equally open to the use of all of the jury, either upon the law or the facts, they could not employ as evidence in this case either of the law or the facts, when they retired to consider their verdict; that if a juror had any peculiar knowledge about the case, in order to bring it before the jury as evidence, he might

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be sworn and testify, and thus in a legal manner bring his knowledge of matters to be used as evidence properly before his fellows upon the jury; that the jury were to decide the case according to the evidence introduced into it, but not on evidence of the law or facts introduced into other cases, in the trial of which some of the jurors in this case did not sit."

The court also "ruled as requested by the defendant upon the rights and duties of the court and jury in reference to instructions by the court and the decision of the law and fact in a general verdict by the jury; that the jury were to decide the case on their oath, according to their evidence; they had received the testimony of the facts from the witnesses upon the stand; and the court now instructed them that the section of the law on which the prosecution was founded was constitutional; and that was the only evidence of the law introduced into the case, and the jury were bound to consider it as evidence upon the law, as they did the other evidence in the case upon the matters submitted to them to decide; and they would try the case according to their evidence." The defendant, being convicted, alleged exceptions.

W. S. Gardner, for the defendant, cited *Commonwealth* v. *Porter*, 10 Met. 263; *Commonwealth* v. *Anthes*, 5 Gray, 185.

J. H. Clifford, (Attorney General,) for the Commonwealth.

METCALF, J. The only question in this case is, whether the instructions given to the jury, concerning their rights and duty in deciding upon the law and the facts, were such as ought to have been given. We doubt whether those instructions were, in all respects, accurate. If they were not, it is, in our judgment, because they were more favorable to the defendant than they ought to have been, and therefore she has no legal cause for objecting to them. *Exceptions overruled.*

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COMMONWEALTH *vs.* PATRICK HARDIMAN.

An indictment on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors, is not supported by evidence of sales of beer, without evidence that it was "strong beer" or "lager beer."

On a criminal trial, if the Commonwealth fails to make out a *prima facie* case, the fact that the defendant produces no evidence to negative an averment which the government is bound to prove will not warrant the jury in finding that averment proved.

INDICTMENT for being a common seller of intoxicating liquors. Trial in the court of common pleas before *Aiken*, J., who signed the following bill of exceptions:

"At the trial the government offered evidence tending to show sales of some kind of beer by the defendant and by others in his employment, which it was claimed by the government was strong beer, but this was denied by the defendant. The defendant offered no evidence.

"The court instructed the jury that the fact that the defendant offered no evidence that it was not strong beer, if such evidence existed, was a circumstance which they might consider with the other evidence in the case, in determining whether the article was or was not strong beer, and whether the defendant was guilty or not guilty. The jury returned a verdict of guilty, and to the above ruling the defendant excepts."

C. R. Train, for the defendant. The law does not prohibit the sale of beer generally, but only of intoxicating liquors, including "strong beer" and "lager beer." *St.* 1855, *c.* 215, § 1. No evidence was offered, and the law raises no presumption, that the beer sold was intoxicating. There was therefore no evidence that the defendant had violated the statute.

J. H. Clifford, (Attorney General,) for the Commonwealth. The absence of evidence tending to show that the act complained of was not unlawful was a circumstance properly submitted to the jury. *Commonwealth* v. *Webster*, 5 Cush. 316. It does not appear that all the evidence is reported.

BY THE COURT. The defendant is to be presumed innocent, until the crime charged against him is proved. It is only after

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the introduction of *prima facie* evidence in support of the indictment, that the absence of evidence tending to a contrary conclusion is to be considered. *Commonwealth* v. *Webster*, 5 Cush. 316. It must be presumed that all the facts are reported upon which the ruling excepted to was based. The judge should have instructed the jury that, in the absence of any evidence of the qualities of the beer proved to have been sold, the defendant was entitled to an acquittal. *Exceptions sustained.*

COMMONWEALTH *vs.* THOMAS RYAN.

An indictment on *St.* 1855, *c.* 215, § 15, for an unlawful sale of "intoxicating liquor" need not more particularly describe the kind of liquor sold.

On the trial of an indictment on *St.* 1855, *c.* 215, for unlawfully selling intoxicating liquors, the burden of proving any license, appointment or right to sell, is upon the defendant, by virtue of *St.* 1844, *c.* 102.

INDICTMENT on St. 1855, *c.* 215, § 15, averring that the defendant, on the 1st of July 1856 at Lowell, "without then and there having any license, appointment or authority therefor first duly had and obtained according to law, did then and there sell to a certain person whose name is Walter P. Bean a certain quantity of intoxicating liquor, to wit, one gill of intoxicating liquor." After trial in the court of common pleas, *Aiken*, J. signed this bill of exceptions:

"Before the trial the defendant moved the court that the prosecuting attorney should either furnish a more particular description of the offence intended to be relied upon; or that the indictment be quashed, for reasons set forth in the motion in arrest of judgment afterwards filed. But the court refused both motions.

"The government introduced evidence tending to show a sale of intoxicating liquor to said Bean, but produced no evidence of any want of license or appointment to make said sale or any

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want of any authority so to do whatever. The defendant objected that this evidence would not support a conviction. But the court ruled that no evidence of a want of authority or of a want of license or appointment to make such sale was necessary in order to a conviction in this case.

"The defendant, being convicted, moved in arrest of judgment, that the offence was not set out fully and plainly, substantially and formally, but the description thereof was too vague and uncertain. But the court overruled the motion. To these several rulings the defendant excepts."

B. F. Butler, for the defendant. 1. The indictment contains no sufficient description of the intoxicating liquors alleged to have been sold. *St.* 1855, *c.* 215, § 1.

2. The allegation that the defendant made the sale "without having any license, appointment or authority therefor," excludes not only any express authority, but any mode not prohibited by the statute, such as by importers, druggists, &c. though not expressed in writing. *Commonwealth* v. *Lafontaine*, 3 Gray, 479 The Commonwealth was bound to produce some evidence of a want of authority. *Commonwealth* v. *Thurlow*, 24 Pick. 381. The *St.* of 1844, *c.* 102, imposes upon the defendant the burden of proof only "if he relies on a license in his defence," which is a matter necessarily within his own knowledge. But neither that statute, nor the reason of the thing, obliges him to prove an authority not depending upon any record or writing.

J. H. Clifford, (Attorney General,) for the Commonwealth.

By the Court. 1. The refusal to quash the indictment or to order a bill of particulars was within the discretion of the presiding judge, and not a subject of exception. *Commonwealth* v. *Hawkins*, 3 Gray, 464. *Commonwealth* v. *Wood*, 4 Gray, 13. The general description of the liquors sold was no ground for arresting judgment. *Commonwealth* v. *Conant*, 6 Gray, 482.

2. The *St.* of 1855, *c.* 215, § 1, declares it to be unlawful and criminal for any person to sell any spirituous or intoxicating liquor, unless he is duly authorized so to do as thereinafter provided. This is equivalent to a provision prohibiting all sales unless authorized as provided by that act. And it is well settled

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as the practical construction of this and similar statutes, that since the *St.* of 1844, *c.* 102, the burden of proving such authority is upon the defendant. *Commonwealth* v. *Kelly*, 10 Cush. 69. *Commonwealth* v. *Tuttle*, 12 Cush. 502. *Commonwealth* v. *Lahy*, 8 Gray, 460. If this were a new question, it might be worthy of more consideration.*

Exceptions overruled.

COMMONWEALTH *vs.* JOHN COFFEE.

Intoxicating liquor, though purchased in this state in violation of *St.* 1855, *c.* 215, intended by the purchaser to be sold in violation of that act, and being transported from place to place in violation of that act, is a subject of larceny.

INDICTMENT for larceny of six gallons of brandy at Townsend in this county.

At the trial in the court of common pleas the district attorney introduced evidence tending to show "that one Josslyn bought of an unauthorized dealer in intoxicating liquors in Boston the intoxicating liquor alleged to be stolen, for the purpose of retailing the same contrary to law in Townsend, the dealer selling it to Josslyn having reasonable cause to believe that the liquor was purchased of him for the purpose of being illegally sold by the purchaser at his store; that the liquor was then, by direction of Josslyn, (who was at the store of the seller when the liquor was bought,) put on the cars of the Fitchburg Railroad Corporation to be by them carried to Josslyn at Townsend, the station agent knowing the destination, quantity and purpose for

* A similar decision was made in Bristol, October term 1857, in the case of COMMONWEALTH *vs.* WILLIAM BARRETT, which was an indictment on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors.

C. I. Reed, for the defendant, cited *Commonwealth* v. *Thurlow*, 24 Pick. 374; *Rex* v. *Rogers*, 2 Campb. 654; Rosc. Crim. Ev. (2d ed.) 71, 72; 2 Russell on Crimes (7th Amer. ed.) 769, 770.

J. H. Clifford, (Attorney General,) for the Commonwealth.

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which the liquor was intended to be used by the owner; and that before the liquor reached the consignee at Townsend, it was taken and carried away by the defendant, and concealed by him."

The defendant objected "that there could not be such property, possession, ownership, custody and right of return of the liquor, under the circumstances of this case, as to support this indictment." But *Aiken*, J. overruled the objection, and, after a verdict of guilty, reported the case to this court.

B. F. Butler, for the defendant. The liquor in question was illegally sold for an illegal purpose; bought for an illegal purpose, to wit, to be sold in this state by the purchaser; it was criminal to own or keep it for such purpose; it was being illegally transported for that purpose at the time of the asportation; and all these intents and purposes were known to the various actors. *St.* 1855, *c.* 215, §§ 1, 3, 18, 19. It was a common nuisance. § 37. And the defendant's taking and concealment of it were an abatement of the nuisance, which was the only lawful act that could be done with it.

How can a man steal a common nuisance? Stolen property is required to be secured, and, upon conviction of the thief, restored to the owner, at the expense of the Commonwealth. Rev. Sts. *c.* 126, §§ 25, 26. Will the law lend its aid to recover this article, and put it back into the power of the purchaser, to enable him to pursue his unlawful purpose? See *Spalding* v. *Preston*, 21 Verm. 9; *Regina* v. *Hunt*, 8 Car. & P. 642.

This case is distinguished from *Commonwealth* v. *Rourke*, 10 Cush. 397, by the fact that this liquor had lost every attribute of property when it was first sold, and from that moment became only an instrument of crime.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Thomas, J. The thing taken was property and the subject of larceny. The owner might forfeit and lose the property, if upon proper legal process it should appear that it was procured and held for an illegal purpose, but only upon such proof, and in the method the law points out. *Commonwealth* v. *Rourke*, 10 Cush 397. *Ewings* v. *Walker*, *ante*, 95. *Exceptions overruled.*

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Lucy A. Ray *vs.* Joseph V. Smith.

In an action for breach of promise of marriage, evidence of the acts and conversation of the parties towards each other during a previous intimacy, which was broken off before the mutual promises relied on, is admissible.

In an action for breach of promise of marriage, the plaintiff introduced evidence that while the intimacy between the parties was broken off, and before the mutual promises relied on, the defendant expressed satisfaction that she had refused to walk with another man, and said that man "could not get her away as long as he had a claim on her." *Held*, that the evidence was admissible.

In an action for breach of promise of marriage, the plaintiff testified that, after the intimacy between the parties was broken off, she boarded at the same house as the defendant and another woman whom he married; and never knew or heard of any intimacy between them before the marriage. *Held*, that evidence that during that time the defendant was publicly attentive to his present wife, with the plaintiff's knowledge, was immaterial, and therefore inadmissible to contradict the plaintiff.

The admission, after the close of the defendant's evidence, of evidence which does not tend to rebut new matter introduced in defence, is within the discretion of the presiding judge, and no ground of exception, even if he does not assign any reason for its admission.

Before the *St.* of 1857, *c.* 305, took effect, the wife of a party to a suit was not admissible as a witness.

Action of contract for breach of promise of marriage. The answer denied all the allegations in the declaration. Trial in this court at October term 1856 before *Merrick*, J., who allowed this bill of exceptions:

"The plaintiff's counsel, in opening the case, stated that in the spring of 1852 intimacies commenced between the plaintiff and the defendant, which continued to February 1853, when, in consequence of improper proposals made by the defendant to the plaintiff, the plaintiff rejected the further addresses of the defendant, and all intimacy was broken off between them; but that renewed attentions occurred, and renewed mutual promises, upon which the plaintiff relied to maintain this action, were afterwards made by them between the 1st and 15th of October 1853.

"The plaintiff was introduced as a witness, and allowed by the court to detail what occurred during the intimacy existing between the parties previously to the alleged rejection of the defendant by the plaintiff; and the fact that it was broken off

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and what she said to him at the time; and that she returned his miniature, which he had previously given her.

"The plaintiff called Timothy Ricker, who was allowed by the court, in answer to questions proposed to him by the plaintiff's counsel, to state that one Sunday evening in the spring of 1853, after the intimacy was broken off, he called upon the plaintiff when the defendant was not present, and invited her to take a walk with him, which invitation she declined; that some time in the week following, in a conversation between the witness and the defendant, the defendant, referring to this invitation, asked the witness what he tried to get Lucy to walk with him for, and told the witness that Lucy (the plaintiff) had bluffed him (the witness) off, and that he could not get the girl away as long as he (the defendant) had a claim on her.

"The plaintiff testified that, in the latter part of the winter or spring of 1854, (after the defendant first promised to marry her,) and also after all attentions to her on his part had ceased, she went to board with the mother of Susan Hemenway (whom the defendant afterwards married) where the defendant also boarded, and that she there remained until after the defendant's marriage, which took place on the 17th of October 1855. The plaintiff also testified that she never knew or heard of any attentions or intimacies between the defendant and his wife, prior to their marriage.

"To contradict this, the defendant offered to show, that after the alleged intimacies were broken off between the plaintiff and the defendant, and subsequently to the time of the alleged breach of the alleged promise of marriage, the defendant was publicly attentive to his present wife with the plaintiff's knowledge; which testimony was, upon the plaintiff's objection, rejected as immaterial.

"On the cross-examination of the defendant, questions were asked him as to intimacies, walks and visits supposed to have taken place between the parties, some of which were, and some of which were not, introduced by the plaintiff in putting in her case; and all of which intimacies, as well as the existence of any engagement at any time, the defendant denied. After the

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defendant had closed his defence, the plaintiff was introduced, and allowed by the court, for the purpose of contradicting the defendant upon the matters drawn out in cross-examination, to testify to certain transactions between the parties, which tended to prove the issue denied in the answer to the declaration.

"The defendant offered his wife as a witness, to facts material to the issue, and which occurred before her marriage. Bu the court refused to admit her to testify.

"To all which rulings, (the verdict being for the plaintiff,) the defendant excepts."

T. H. Sweetser, for the defendant. 1. What occurred and was said between the parties at a time anterior to the promises and attentions relied upon by the plaintiff in this action was immaterial, and tended to prejudice the jury. 1 Greenl. Ev §§ 52, 448. *Odiorne* v. *Winkley*, 2 Gallis. 53.

2. The testimony of Ricker should have been rejected, for the same reasons.

3. Evidence of the defendant's attentions to another woman, subsequently to the alleged promises, in the presence and with the knowledge of the plaintiff, should have been admitted. Her remaining in the same boarding-house under such circumstances tended to show that the alleged promises were never made to her. And the evidence tended to contradict the plaintiff; and also to show that her feelings were never much enlisted, and thus to affect the measure of damages, if any. Sedgwick on Damages, (2d ed.) 368, 369.

4. After the close of the defendant's case, the plaintiff could only introduce evidence to rebut new matter shown in defence, except by the discretion of the court, and for reasons assigned. Here no such appeal was made, but the evidence was admitted as matter of right.

5. All objections against the admission of the testimony of the defendant's wife have been removed by the recent changes in the statutes.

B. F. Butler, for the plaintiff.

By the Court. 1. The testimony of the existence and breaking off of a previous intimacy was rightly admitted. The

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whole relation of the parties was admissible, including the whole course of the courtship.

2. Ricker's testimony was admissible to prove the feelings of the defendant, and that he was in the receipt of information as to the plaintiff's acts, and had not abandoned all intention of prosecuting his addresses.

3. The evidence introduced by the defendant, that the plaintiff had the means of knowing his attentions to another woman, related to a time when the intimacy between the plaintiff and the defendant had been entirely broken off, and was immaterial to the issue, and therefore rightly rejected.

4. The order of proof was within the discretion of the presiding judge, and not a subject of exception.

5. The wife of the defendant was not a competent witness under the statutes in force at the time of the trial. *Barber* v. *Goddard*, *ante*, 71. *Exceptions overruled.*

MARTIN L. SMITH *vs.* NATHAN MERRILL & others.

Permitting a defendant, after the commencement of the plaintiff's closing argument, to introduce evidence to explain entries then first pointed out by the plaintiff in books previously put into the case by the defendant, is no ground of exception.

In an action by the assignee of an insolvent debtor under *Sts.* 1838, c. 163, and 1841, c. 124, to recover the value of goods conveyed away by the debtor, the plaintiff has no ground of exception to instructions that he must prove that the debtor, at the time of making the sale, was in fact insolvent, and in fact intended to prefer the defendant as a preëxisting creditor; and that if he made the sale in good faith, and with the intent solely to procure means for the prosecution of his business, and with no intent to prefer a preëxisting creditor, the sale would not be invalidated by the fact that part of the consideration of the sale was a credit on a previous debt from him to the purchaser.

ACTION OF TORT by the assignee of insolvent debtors to recover the value of goods alleged to have been sold by the debtors in fraud of the insolvent laws. Trial before *Merrick*, J., and verdict for the defendant. The plaintiff alleged exceptions to the following rulings and instructions:

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One of the defendants, who kept their books, testified in their behalf; and among other things stated that a certain writing was a correct transcript from the books (which were then in court) of the account between the defendants and the debtor. The plaintiff's counsel, after the close of the defendants' case, asked their counsel whether the books were in the case; to which he responded affirmatively; but no part of the books was then read or particularly referred to.

In the course of his argument to the jury, the plaintiff's counsel referred to other portions of the books of the defendants besides that transcribed as aforesaid, and contended that they exhibited evidences of fraud, and had been tampered with, and was proceeding to show wherein, when he was stopped by the judge, upon the ground "that if he desired or intended to avail himself of such parts of the books, he should either have read the same to the jury, or have given notice of his intention to the adverse party in season to enable him to offer evidence or make any necessary explanation concerning the same; and that as the course now pursued appeared to be a surprise upon the defendants' counsel after he had closed his argument, the court could not permit those portions of the books to be now read to the jury and commented upon by the counsel for the plaintiff, without affording to the defendant an opportunity to submit to the jury any competent evidence and explanations relative thereto." The counsel for the plaintiff continuing to claim the right to read said portions of the books, and to comment thereon, the counsel for the defendants expressed a wish to offer such evidence and explanations, and was allowed by the court to do so; and the like privilege was allowed to the plaintiff's counsel if he desired it. The defendants' counsel thereupon recalled the witness first above mentioned, and examined him concerning the portions of the books so referred to by the plaintiff's counsel; but declined making any remarks to the jury. The plaintiff's counsel then, without offering further evidence, proceeded with and finished his argument.

In his charge the presiding judge instructed the jury, "upon the question of the insolvency of the plaintiff's insolvent at the

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time of the alleged fraudulent sale, that in order to avoid a sale made as contemplated under *Sts.* 1838, *c.* 163, and 1841, *c.* 124, by an insolvent, with intent to prefer a preëxisting debt, &c., the assignee seeking to avoid it must show affirmatively to the jury, and to their satisfaction, that the insolvent, at the time of making the sale, was in fact insolvent, and in fact intended to prefer the defendants as preëxisting creditors."

It appeared upon the trial, that at the time of the sale of said goods to the defendants the debtor was engaged in carrying on the business of manufacturing other similar goods; and evidence was produced tending to show "that he and the defendants, and other parties with whom he was dealing, felt confident that the business was very valuable, and would, if continued, prove very advantageous to the manufacturer and afford him large profits; that at the time of said sale the debtor had on hand a large amount of unfinished goods which he desired to complete and get into the market as soon as possible, and for that purpose desired to raise some present available cash means; that in order to procure such means he applied to the defendants, and offered to sell them the goods sued for; that they accepted his offer, and paid him therefor by giving him credit for a smaller amount, in which he was indebted to them, and by two promissory notes."

The judge instructed the jury, "that if the sale was made in good faith by the debtor, and with the intent solely to obtain means for the continued prosecution of his business, and with the intention and expectation that he would be able to do so, and with no intent or purpose whatever on his part to give any preference to a preëxisting creditor, the payment of the amount due to the defendants, being in such case merely incidental to the principal and real object of the parties in the transaction, was not such a preference of a preëxisting creditor as would be sufficient in law to invalidate the sale and thereby enable the assignee of the vendor to recover of the purchaser the value of the goods."

M. G. Cobb, for the plaintiff, contended that the books were in the case, and the reading of them had been waived; and that

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the instructions were erroneous in requiring the plaintiff to prove that the debtor was actually insolvent, when it was sufficient to prove that he had no reasonable cause to believe himself solvent; and in holding that an intent to secure a preëxisting creditor was not within the statute.

L. Marrett, for the defendants.

DEWEY, J. Objections to the introduction of testimony, depending upon the time at which it was admitted, are not a subject of exceptions. In the present case, the rights of the defendants would seem to have required the departure from the ordinary order of introducing evidence, the contents of the book not having been made known or offered to the jury until the closing argument for the plaintiff.

The instruction to the jury, that the plaintiff must show to the satisfaction of the jury that the party whose conveyance was sought to be avoided was in fact insolvent, was correct. Of course we are to understand "insolvency" in its legal sense.

The further instruction, that the plaintiff must show affirmatively that the debtor in fact intended to prefer the defendants as preëxisting creditors, was also correct. By such ruling the nature and character of the evidence which would be required to show this fact was not at all limited, nor were the jury at all restricted from inferring the fact of intention to prefer from evidence of his known insolvency and other circumstances confirmatory of such a purpose.

The last instruction objected to is that in reference to the sale being made in the course of business, in good faith, in the full expectation that the vendor would continue in business, and with no intent on his part to give any preference to a preëxisting creditor. We see no legal objection to this instruction; or to the ruling that, under such circumstances as were stated, the application of a part of the proceeds of the sale to the payment of a preëxisting debt would not vitiate the sale.

Exceptions overruled.

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David Clark & another *vs.* Hamilton Mutual Insurance Company.

Omission to disclose to insurers repeated incendiary attempts to destroy the property insured will not avoid the insurance.

In an action on a policy of insurance, in which the defence relied upon is a subsequent insurance contrary to the terms of the first policy, the burden of proving that the two policies covered the same property is upon the defendants.

A policy of insurance upon "carpenter's shop and carpenter's tools" provided that the issuing of any other policy covering any portion of the property insured, and not disclosed to these insurers, should avoid this policy. *Held*, that evidence of the issuing of another policy to the same person upon "four chests of carpenter's tools in wood shop," described as situated in the same street as in the first policy, and that there were in the shop two chests of tools belonging to the assured, and two or perhaps three belonging to their journeymen, did not show that any part of the property was covered by both policies.

Action of contract on a policy of insurance issued by a mutual insurance company on the 1st of July 1852 to the plaintiffs upon "carpenter's shop, carpenter's tools," hardware, fixtures and lumber, in "Brattle Place," West Cambridge, "subject to the provisions, conditions and limitations of the charter and by-laws of said company, and the lien on the interest of the person insured in any personal property or builings covered by this policy, and the land under said buildings," which the company expressed their intention to rely upon.

The by-laws of the company, which were printed upon the policy, contained these provisions: Art. 11. "If the insured shall refuse to pay any assessment, or if for any other cause the continuance of the risk is considered unequal or injurious to the company, the directors may terminate the same." Art. 14. "If the risk on any property insured by said company shall be increased by any change of the circumstances disclosed in the application, or by the erection or alteration of any building, the carrying on of any hazardous trade, or the deposit of any hazardous goods in or near the same, the policy thereon shall be void," unless confirmed in writing by the directors. Art. 18. "In case any other policy of insurance has been or shall be issued, covering the whole or any portion of the property insured by this company in any policy, the policy issued by this com-

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pany shall be void, although such other policy shall be void also, unless the directors shall have been notified of such other policy, and given their consent thereto in writing signed by the president and secretary."

At the trial before *Merrick*, J., the defendants offered to prove, and it was admitted that they could prove, if competent, that, after they made this policy, "attempts had been made on three several and distinct occasions by some person or persons unknown, other than the plaintiffs, to set fire to and burn the shop of the plaintiffs; and no information of these facts was communicated by the plaintiffs to the defendants, until after the plaintiffs' shop and all the tools contained therein had been consumed and destroyed by fire, set by an unknown incendiary." The defendants also offered to prove, by experts in insurance risks and hazards, that such incendiary attempts were a material change in the circumstances of insured property, and materially increased the hazard of insuring it. The evidence offered was rejected.

The defendants introduced and read to the jury a policy of insurance issued by the Hampden Stock and Mutual Fire Insurance Company to the plaintiffs on the 17th of August 1854 on "four chests of carpenter's tools in wood shop in West Cambridge," and "predicated upon an application or survey," which was made a part of the policy, and described the property insured as situated in "Brattle Place," and had indorsed upon it the following: "Remarks of Agent. Messrs. Clark & Burr wished me to file an application to insure this property; they employ ten hands, four or five of which work in the immediate neighborhood, so that their chests remain in the shop; and Messrs. C. & B. think that this insurance will render their hands contented and not so liable to change places.

"Isaac H. Damon, Agent."

The plaintiffs contended that the tools insured by the Hampden Company were not the same insured by the defendants, but belonged to certain journeymen in the plaintiffs' employment, for whose benefit that insurance was obtained. It appeared that at the time of that insurance and of the fire there were in

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the shop two chests of tools belonging to the plaintiffs, and also two and perhaps three chests of tools belonging to workmen in their employment.

Damon, and Clark, one of the plaintiffs, were called as witnesses, and testified that Damon filled out that application, and forwarded it to the defendants at Springfield, after being requested to obtain insurance for the plaintiffs on four chests of tools belonging to journeymen in their employment. On cross-examination, Damon testified that he made no other communication to the Hampden Company than the writing on the application, and that, so far as he knew, they had no knowledge that their policy was to be on the tools of journeymen employed by the plaintiffs; and Clark testified that when he signed that application he supposed it related to and corresponded with the tools of the journeymen. All this evidence was objected to by the defendants, but admitted.

The case was then reserved for the full court, the parties agreeing that if the facts concerning the attempts to set fire to the shop and the plaintiffs' omission to make them known to the defendants constituted no defence to the action, and if the evidence concerning the journeymen's tools and the application to the Hampden Company was competent, and, taken in connection with the two applications and policies, was sufficient to show that the two insurances were not upon the same tools, judgment should be rendered for the plaintiffs; otherwise, for the defendants.

S. A. Brown, for the plaintiffs.

J. W. Perry, for the defendants. 1. Continued and persistent efforts by unknown incendiaries to burn the property were such material circumstances, as, if occurring before the insurance, should have been disclosed in the application, or, if arising afterwards, constituted a change of circumstances, within the meaning of the 14th by-law. *Bufe* v. *Turner*, 6 Taunt. 338. *Clark* v. *Manufacturers' Ins. Co.* 8 How. 235. *Curry* v. *Commonwealth Ins. Co.* 10 Pick. 535. *Fletcher* v. *Commonwealth Ins. Co.* 18 Pick. 419. *Child* v. *Sun Mutual Ins. Co.* 3 Sandf. 26. 1 Arnould on Ins. 532. Beanmont on Ins. 39. If the directors had

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known this, they might have terminated the insurance, under the 11th by-law.

2. The defendants' policy attached to all the tools of the plaintiffs, in chests or otherwise, in the shop; the policy of the Hampden Company applied to four chests of tools of the plaintiffs in the same shop. That company never contemplated insuring any tools but the plaintiffs'. The memorandum on the back of the application contains no statement that the tools of the journeymen are meant to be insured. There is no ambiguity, latent or patent, in either policy. The testimony of Damon and Clark to the conversation about the purpose of procuring that policy was incompetent. *Weston* v. *Emes*, 1 Taunt. 115. *Kaines* v. *Knightly*, Skin. 54. *Leslie* v. *De La Torre*, cited 12 East, 583. *Work* v. *Merchants & Farmers' Ins. Co.* 11 Cush. 271. *Holmes* v. *Charlestown Mutual Fire Ins. Co.* 10 Met. 211. *Finney* v. *Bedford Commercial Ins. Co.* 8 Met. 348. *Ewer* v. *Washington Ins. Co.* 16 Pick. 502. *Whitney* v. *Haven*, 13 Mass. 172. *Higginson* v. *Dall*, 13 Mass. 96. *Higgin* v. *Boardman*, 14 Mass. 12. The defendants' policy is therefore void by the terms of the 18th by-law, whether the other policy is void or not.

Thomas, J. This is an action upon a policy of insurance. There were two grounds of defence. The first was a change in the circumstances of the insured property, materially increasing the risk, and not communicated to the defendants. This alleged change of circumstances consisted in attempts on three distinct occasions to set fire to the shop insured. The court rejected the evidence, with the idea probably that the object of the policy of insurance was protection against loss by fire — fires kindled by incendiaries included.

The second ground of defence was a subsequent insurance on the same property, without notice to the defendants. The question of fact which arose was, whether the property insured in the second policy was the same as that insured in the first. Upon this point the testimony of the agent of the second insurance company and of one of the plaintiffs was admitted of the declarations, made at the time of insurance, as to what prop-

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erty the plaintiffs desired to have their policy cover. We think the admission of this evidence was an error. The contract in writing could not be so controlled.

But we think also that the burden of proof was upon the defendants to show that the property insured in the second policy was the property insured in the first policy; that upon the evidence reported this burden was not discharged; and that, upon the competent evidence in the case, it does not appear that the property was the same. The result however is to send the case back for a *New trial.*

JOHN M. G. PARKER *vs.* EAGLE FIRE INSURANCE COMPANY.

Under a policy of insurance on a building against fire, which provides that the insurers may "make good the damage by repairs, and the insured shall contribute one fourth of the expense," if the insurers, intending to comply with this provision in good faith, make repairs of substantial benefit, though not fully making good the loss, the measure of the assured's damages is the difference between the value of the building as repaired, and what it would have been if fully repaired; deducting one fourth of their value to the estate.

ACTION OF CONTRACT to recover a loss by fire under a policy of insurance upon three wooden houses, "under the conditions and limitations expressed in the by-laws" annexed to the policy, the sixteenth of which provided "that the company shall have the right to make good the damage by rebuilding, replacing or repairs; and the insured shall contribute one fourth of the expense of rebuilding or repairing."

At the trial in this court, the defendants admitted a partial loss; but contended, and offered evidence tending to prove, that they had repaired it and made it good according to that by-law. The plaintiff offered evidence tending to show that the repairs made by the defendants were not sufficient to make good the loss.

The defendants requested the following instruction: "If the jury shall find that the defendants did repair the buildings injured by fire, but not in such perfect manner as to make them as good as before the fire, then the measure of damages is the

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sum which the plaintiff is damaged by the insufficiency of the defendants' repairs." But *Merrick*, J. refused this instruction; and instructed the jury, "that the defendants having undertaken to make good the plaintiff's loss, by replacing, rebuilding and repairing, if they had not fully done this, so as to make the building substantially as good as before the fire, no deduction should be made from the damage, originally done to the plaintiff's buildings by fire, for any repairs made by the defendants, and if the defendants had not fully made good the plaintiff's loss by their repairs, then the jury should give the same damages to the plaintiffs as if no repairs had been made." The jury returned a verdict for the plaintiff for his full damages, and the defendants excepted to this ruling.

I. W. Beard, for the defendants.

B. F. Butler, for the plaintiff. The contract of fire insurance is a contract of indemnity for actual loss; and the damages are to be ascertained by the expense of restoring the property to its condition before the fire, without any deduction for the difference in value between new and old, or any regard to the cost of the property. 2 Greenl. Ev. § 407. *Brinley* v. *National Ins. Co.* 11 Met. 195. Insurers have no right to repair or rebuild, except by express stipulation in the contract of insurance. 2 Phil. Ins. § 1754. Such a stipulation can only be complied with by a complete indemnity; and if the insurers elect to repair, they do so at their own peril if they fail to completely restore the building; they cannot repair in part, and pay damages in money for the remainder of the indemnity. If they could, they might erect a building entirely different from the original.

THOMAS, J. The defendants were to repair the buildings under the contract between the parties, made by the by-law. It was a contract to be performed upon the real estate of the plaintiff, and the usual rule as to labor and materials furnished upon real estate applies. The labor done and materials furnished in building, and in the repair of buildings, become incorporated with and additions to the real estate of the owner. If therefore the repairs were made with the purpose of comply-

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ing with the by-law in good faith, and were of substantial benefit to the plaintiff, the defendants should have the advantage of them, though not so perfect as fully to make good the plaintiff's loss. The difference between the value of the buildings as repaired in fact, and what the value would have been had the repairs been full and complete, is the measure of damages in the case.

It is to be observed that under the by-law one fourth of the expense of the repairs is to be borne by the insured. In a case where the repairs are imperfect, he should bear not one fourth of the cost of repairs, but of their value to the estate.

Exceptions sustained.

ELISHA HUNTINGTON *vs.* PROPRIETORS OF LOCKS AND CANALS ON MERRIMACK RIVER.

A laying out, by the proprietors of a canal, of a public landing place on its bank, pursuant to a statute, does not deprive them of the title in the land, or of the right to surround it with a wall on all sides except towards the canal, leaving a gate to be kept open at all seasons when the canal is navigable.

BILL IN EQUITY by the mayor of Lowell, being an inhabitant thereof, to restrain the Proprietors of the Locks and Canals on Merrimack River, (incorporated by *St.* 1792, *c.* 13,) from inclosing with a wall the Lower Free Landing Place, so called, by the side of their canal in Lowell, which had been laid out by them in 1835 on their own land, according to the provision of *St.* 1835, *c.* 132, § 2, requiring them to "construct and maintain two free landing places, the one above and the other below the Swamp Locks, to be approved by the selectmen of the town of Lowell;" and accepted in 1837 by the mayor and aldermen of Lowell, which had meanwhile become a city; and since used by the city, its inhabitants and other persons, for the landing of merchandise and for other purposes; and from which a public street thirty feet wide had been laid out, leading to Market Street, one of the principal streets in Lowell

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Answer, that the fee in this landing place had remained in the defendants, subject to the rights of those persons only who might lawfully land merchandise from the canal, or place merchandise thereon for transportation on the canal; that the defendants had not dedicated or appropriated the land to any other purpose, and had always endeavored to keep it open for those purposes; that the street leading to Market Street was sufficient for the accommodation of all persons having occasion for those purposes to visit or enter upon the landing place; that the defendants had begun the erection of a wall, eighteen inches thick and four feet high, on those sides of the landing place not abutting on the canal, intending thus to inclose all those sides except opposite the end of that street, and there to erect a gate, to be kept closed at those seasons of the year when the canal and the Merrimack River were closed with ice and not navigable, and to be kept open at other seasons; and that their object in so doing was to preserve the landing place for its appropriate use, and also to prevent the city, the public and individuals, from acquiring any rights therein by a continuous, unauthorized and wrongful use for other purposes, and to protect their own rights as owners of the landing place; and that such wall was suitable for these objects, and would not hinder or obstruct any lawful use or access to the landing place through that street.

The parties stated a case, in which the truth of the facts above alleged was admitted.

R. B. Caverly, for the plaintiff.

S. A. Brown, for the defendants.

By the Court. The dedication of the place in question for a public landing left the title, subject to that easement, in the defendants, with the right to the use, possession and control of the property in any mode not inconsistent with its use for a landing place. That public easement will not be affected by inclosing the landing place on all sides except towards the canal, leaving a convenient access at all seasons when the canal is navigable. The acts complained of will not encroach upon the rights of the public, or be in any other respect a nuisance.

Bill dismissed.

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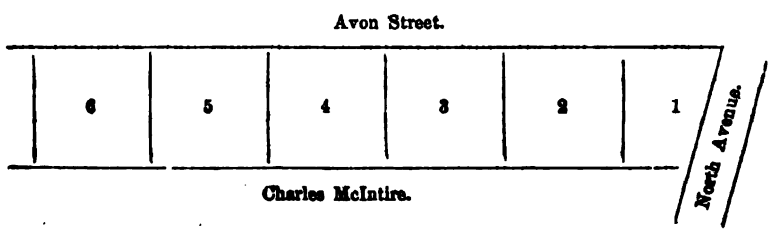
ASA MURDOCK *vs.* FRANCIS L. CHAPMAN.

A mortgage of land passes the grantor's title, though it be only in mortgage.

A mortgage described the land mortgaged as running westerly from a certain point a certain distance "to land of R., thence southerly at right angles by said R.'s land," &c. "being lots Nos. 3, 4, 5 and 6 on a plan" described and recorded, and the courses and distances on which corresponded to those in the deed. *Held*, that the four lots passed, though lot 5 was owned by R. and mortgaged to the grantor.

WRIT OF ENTRY to recover land in Cambridge, being lots 3, 4, 5 and 6 on a plan of Joseph Porter, made in September 1847, and recorded in the registry of deeds in 1850, the material part of which is copied in the margin.* Each of the lots was seventy six feet wide, and bounded by Avon Street on the north, and by land of Charles McIntire on the south. The tenant pleaded the general issue as to lots 4 and 5, and disclaimed all right in lots 3 and 6. The case was submitted to the decision of the court upon the following facts:

On the 1st of October 1847 Porter, being seised in fee of all these lots, conveyed lot 5 to George W. Randall in fee, who immediately mortgaged it back. On the 18th of September 1848 Porter mortgaged to Thomas Stearns "a certain piece of land situated on the westerly side of North Avenue, in the city of Cambridge, and southerly of a new street called Avon Street, bounded and described as follows, viz.: Beginning at a point on the southerly line of said Avon Street, at a stake which stands one hundred and fifty five feet westerly of the westerly line of said North Avenue, at the corner of lot No. 2 on a plan of building lots in Cambridge, belonging to J. Porter," (being the plan



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above mentioned,) "thence running westerly by said Avon Street three hundred and four feet to land of George W. Randall; thence at right angles southerly by said Randall's land seventy six feet to land now of Charles McIntire; thence easterly by said McIntire three hundred and four feet to a stake; thence northerly by lot No. 2 on said plan, now belonging to me, seventy five feet six inches to the place of beginning, being lots No. 3, No. 4, No. 5 and No. 6 on said plan." This mortgage to Stearns was assigned by him on the 25th of April 1850 to Almon Abbott, who on the next day made an open and peaceable entry for breach of condition of said mortgage, and on the 3d of February 1854 sold the premises, under a power in said mortgage, to the demandant. On the 14th of March 1851 Randall reconveyed to Porter lot 5, Porter discharging his mortgage; and on the 23d of September 1853 Porter gave a deed of lot 5 to the tenant. On the 2d of November 1854 the demandant conveyed lots 3 and 4 to the tenant, who immediately conveyed lot 3 to another person.

J. P. Converse, for the demandant.

D. E. Ware, for the tenant. In the construction of deeds, distances are controlled by monuments; and a line is a monument. *Flagg* v. *Thurston*, 13 Pick. 145. *Cook* v. *Babcock*, 7 Cush. 526. A description by monuments controls a plan referred to in the deed. *Tenny* v. *Beard*, 5 N. H. 58. *Esmond* v. *Tarbox*, 7 Greenl. 61. *Worthington* v. *Hylyer*, 4 Mass. 196. *Loomis* v. *Jackson*, 19 Johns. 449. In the deed of Porter to Stearns, the monuments describe only lots 3 and 4, and of themselves make a complete description.

At the time of entry for foreclosure, the title to lot 5 was in Randall, so that as to that lot there was no foreclosure, and no title passed by the subsequent assignment to the demandant.

Bigelow, J. The only question in this case is whether the deed of Porter to Stearns, dated September 18th 1848, under which the demandant claims title, conveyed lot No. 5. If this lot was included in the description, then, although it had been previously conveyed to Randall by Porter, the latter was still mortgagee thereof, and his deed to Stearns would pass his

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mortgage title, which was paramount to that of the tenant *Hunt* v. *Hunt*, 14 Pick. 380. *Freeman* v. *M'Gaw*, 15 Pick. 86.

The position assumed by the tenant is that this lot was not conveyed by the deed from Porter to Stearns, because the premises conveyed are described as running "westerly by Avon Street three hundred and four feet to land of George W. Randall, thence at right angles southerly by said Randall's land seventy six feet to land of Charles McIntire." This description, standing by itself, without anything else in the deed to explain or control it, would certainly exclude lot No. 5, which had been previously conveyed to Randall. But, taken in connection with the residue of the description, it was clearly a misdescription of the land intended to be conveyed, and must be rejected as *falsa demonstratio*. The deed expressly refers to a plan and conveys lots numbered 3, 4, 5 and 6 on said plan. By the well settled rule of construction in this commonwealth, when a plan is referred to in a deed, as part of the description, all the particulars appearing on such plan are to be regarded as if they had been fully set forth in the deed. *Morgan* v. *Moore*, 3 Gray, 319. Lot No. 5 was therefore as fully conveyed by the deed, as if it had been described in detail by courses, distances and boundaries. The plain intent of the parties must govern. The admeasurements, the plan and the express terms of the grant show that the intention was to grant lot No. 5 as well as the other lots named in the deed. If full effect were given to the boundary by Randall's land, it would contravene all the other terms of description in the deed. This is a case therefore where the usual rule, that monuments are to govern in the construction of deeds, must give way, because an adherence to it would be plainly inconsistent with the intent of the parties to the conveyance, and would require effect to be given to a single erroneous description, at the sacrifice of all the other terms by which the premises intended to be granted were indicated. It falls within the recognized exception to the rule, as established in *Davis* v. *Rainsford*, 17 Mass. 207. *Judgment for the demandant.*

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Marlborough Branch Railroad Company *vs.* Winthrop Arnold.

A book containing subscriptions to the stock of a corporation for as many shares as the charter required should be subscribed for before any assessment was laid, which came into the possession of the corporation immediately on its organization, which has been always treated by them as showing the number of shares subscribed for, and on the faith of which the directors have laid an assessment, is *prima facie* evidence that the number of shares requisite for an assessment had been subscribed for.

Action of contract on the Rev. Sts. *c.* 39, § 53, to recover an unpaid balance of assessments of $80 a share on shares in the plaintiffs' capital stock, for which the defendant was alleged to have subscribed by signing an agreement, headed "Marlborough Branch Railroad Company — Articles of Subscription to Capital Stock," which, after reciting the incorporation of the plaintiffs by *St.* 1852, *c.* 162, (fixing their capital stock at eight hundred shares of not more than $100 each,) and the selection of a location, proceeded thus; "And whereas it is deemed important that the meeting be called by the corporation to organize such corporation, and that the book of subscription be opened immediately, so that the work may proceed without delay. Now therefore we the undersigned do hereby severally agree to take the number of shares in the capital stock of such corporation set against our respective signatures, and promise to pay the assessments that shall be levied thereon, not exceeding one hundred dollars per share, upon the following conditions," one of which was, "that not more than one dollar per share shall be assessed upon the capital stock until eight hundred dollars shall be subscribed."

The answer put in issue all the allegations in the declaration and particularly alleged that certain subscriptions, purporting by the agreement relied on to have been made, were not genuine.

At the trial in the court of common pleas before *Sanger*, J., the plaintiffs put in evidence a book containing the original agreement of subscription, and offered evidence tending to show that this book was at the meeting for the organization of the

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corporation, and was the only subscription list there, and was then treated, acted upon and accepted as the subscription book of the corporation, and had ever since been so treated and kept in the possession of the treasurer of the company; that, at the time of the laying of the first assessment, the directors examined this subscription list to see if it was full, and found there were eight hundred shares subscribed for, and thereupon laid the first assessment.

There was no evidence to show that said list was ever canvassed by the directors as a board and declared full, or that it was before the board at the time of laying the assessments, or that there was any vote of the directors declaring it full, or any vote apportioning and allotting the stock according to this or any other subscription list. And this paper had never been treated or acted upon by the corporation or its officers as subsisting after the organization of the corporation.

It appeared that the defendant subscribed to this book for three shares of the stock before the acceptance of the charter or any organization of the plaintiffs as a corporation.

There was no proof that the defendant or any considerable part of the other subscribers attended or took part in the organization, or in any subsequent action of the corporation, or ever recognized this subscription list in any way as a book of the corporation.

The plaintiffs asked the court to rule that this book of subscriptions, thus treated, acted upon and kept, furnished *prima facie* evidence that at the time of the laying of the first assessment eight hundred shares had been subscribed for *bona fide*. But the court refused so to rule; and ruled that the plaintiffs must in the first instance, as part of their case, prove by other evidence that the signatures to the book were genuine, which the defendant had specified in the answer. The plaintiffs became nonsuit, and alleged exceptions.

D. Thaxter, for the plaintiffs.

G. Bemis, for the defendant. The paper offered by the plaintiffs, not being a record of the corporation, nor a contract made or purporting to be made with the corporation, nor ratified or in

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any way recognized by the defendant after organization, nor a document which the corporation themselves have ever officially recognized as a full stock list, is no proof of its own genuineness. *Dana* v. *Underwood*, 19 Pick. 99. *Howe* v. *Peabody*, 2 Gray, 556. Angell & Ames on Corp. § 679. Grant on Corp. 318. 1 Greenl. Ev. § 493. Even if a corporation record, it was not competent for the purpose offered. *Salem Milldam* v. *Ropes*, 9 Pick. 187. *Stoneham Branch Railroad* v. *Gould*, 2 Gray, 277. *Cabot & West Springfield Bridge* v. *Chapin*, 6 Cush. 50. *Lechmere Bank* v. *Boynton*, 11 Cush. 369. *Central Turnpike* v. *Valentine*, 10 Pick. 142. *People's Ferry* v. *Balch*, 8 Gray, 303.

Merrick, J.* The instructions asked for by the plaintiffs should, under the circumstances stated in the bill of exceptions, have been given to the jury. By the provisions of the charter of the corporation, no assessment could be laid upon the shares of its capital stock until at least eight hundred shares had been subscribed for. But it appeared by the book of subscriptions, of which the corporation immediately after its organization became possessed, that that number of shares had been taken or agreed to be taken by different individuals. These subscriptions were all recognized and accepted by the company as valid agreements on the part of the several subscribers to take the number of shares written against their respective signatures. This book was retained by the corporation, and was always afterwards treated by it as the exhibition and proof of the number of shares of its capital stock, which had actually been taken and subscribed for. The company had a right so to consider it and to make it the basis of further action; for subscriptions for shares, though made before the organization of the corporation, may become obligatory upon the parties, if made after the act of incorporation has been obtained. And in such case the subscription book is competent and proper evidence to be submitted to the jury, and, if not countervailed by any other proof, will be held to be conclusive of the liability of the subscrib-

* This case was decided, and the remaining cases of this term were argued, at Boston in February 1858, before all the judges except *Thomas*, J.

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ers. *Lexington & West Cambridge Railroad* v. *Chandler*, 13 Met. 311.

The corporation being in possession of the subscription book, and the several subscriptions upon it purporting to be, and apparently being, genuine and authentic, it afforded a justification to its officers in proceeding to lay assessments upon the shares of the capital stock. The imposition of such an assessment is an act performed by the directors in the discharge of their official duty; and it is therefore, in the absence of opposing evidence, to be considered as justly and rightly done. 1 Phil. Ev. (4th Amer. ed.) 469 & notes. But this could be right only upon the assumption that the subscriptions for stock upon which they acted were real and genuine; and therefore this effect is to be allowed and given to them, until something is shown to create a doubt or bring the validity of the subscriptions into question. For these reasons the book which was produced by the plaintiff should, in connection with the circumstances proved in relation to it have been considered *prima facie* evidence of the amount and number of shares of stock subscribed for; and because the presiding judge declined to instruct the jury to that effect, the nonsuit must be set aside, and a

New trial granted.

WILLIAM J. FARNSWORTH *vs.* DAVID L. TAYLOR & others.

A deed bounding land on a street, delineated on a plan referred to in the deed, exhibited at the sale, and subsequently recorded by the grantor in the registry of deeds, estops the grantor and those claiming under him to deny the existence of the street of the full width and extent laid down on the plan.

The owner of a tract of land laid it out into streets and house lots, and sold the lots by auction on the premises; and distributed at the sale, and recorded in the registry of deeds, a plan, on which the streets and house lots were delineated; and referred to said plan in his deeds, one of which bounded the land conveyed "on a forty feet street laid down on said plan, and called Y. Street," which street on the plan was forty feet wide except towards its termination in V. Street, where it grew wider. *Held*, that the grantor and those claiming under him were estopped to shut up any part of said street as shown on the plan, even outside of the width of forty feet, and although the selectmen had laid out Y. Street only forty feet wide throughout; and that the subsequent narrowing of V. Street by the county commissioners did not affect the rights of the parties.

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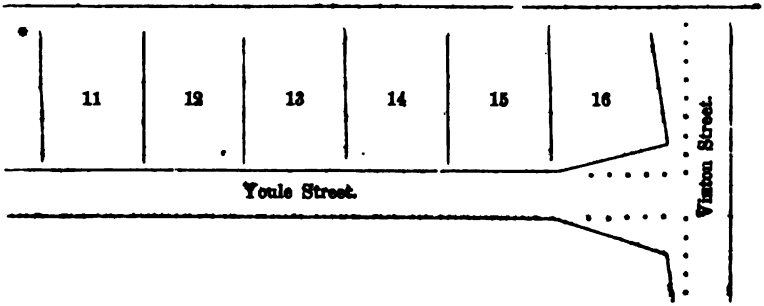
ACTION OF TORT for breaking and entering the plaintiff's close in Melrose. The parties submitted to the court the question whether the action could be maintained upon the following statement of facts:

James Pratt in his lifetime was seised in fee of the premises on which it is alleged that the trespass was committed, and of other land around and adjoining the same; and in 1846, while so seised, caused to be made a plan of said premises, laying out the same into streets and house lots; and on the 8th of May 1846 sold the lots so laid out by public auction on the premises, using and distributing at the sale a certain plan, a copy of which was also recorded in the Middlesex registry of deeds; and also representing at the time and place of sale that the streets were to be and remain open as represented upon said plan; and made deeds to the purchasers of said lots, in which reference was made to the plan so recorded.

Upon the plan were delineated twenty three lots, and the streets by which they were bounded. One of these streets, called Youle Street, was forty feet wide on the plan, except towards its eastern termination, where its side lines gradually diverged so that its width where it entered Vinton Street was seventy feet. Upon the plan was a memorandum that of certain streets other than Youle and Vinton Streets "the lines may vary slightly from the plan." So much of the plan as is necessary to the understanding of this case is copied in the margin.* The dotted lines indicate the subsequent alterations of the streets by the selectmen and the county commissioners as mentioned below.



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One of these deeds was to Lucius Beebe, of five "lots numbered twelve, thirteen," and three others, "on a plan of lands belonging to said James Pratt, sold by public auction on the 8th inst., a copy of which plan is deposited in the registry of deeds for said county of Middlesex for the purpose of reference," and "bounded and described as follows, to wit: beginning at a point on a forty feet street laid down on said plan, and called Youle Street, by the corner of lot numbered fourteen," thence running northwardly, westwardly and southwardly by other lots and streets on said plan, and finally by lot number 11 "to said Youle Street, thence turning and running easterly again by said Youle Street to the point of beginning, together with all the rights, easements, privileges and appurtenances to the same belonging." The defendants derived their title from Beebe, and at the time of the alleged trespass were seised in fee of lots 12 and 13, and owned and occupied dwelling houses thereon.

The selectmen of the town of Melrose afterwards viewed and laid out Youle Street as a town way of the uniform width of forty feet, and the same was duly accepted by the town. And the county commissioners altered Vinton Street north of Youle Street by narrowing it on the west side, leaving it forty feet wide; but Vinton Street was never built according to such alterations.

In 1855 the plaintiff acquired the title of James Pratt in the lot numbered 16, bounded on the east on "Vinton Street, on the line recently established by the county commissioners, until it intersects Youle Street; thence running by the north side of Youle Street to land numbered lot 15 on a plan of lots heretofore recorded; thence running northerly," &c.

The land upon which the alleged trespass was committed is outside of the town way as laid out by said town, and within the limits of Youle Street as laid out and represented on said plan; and, from the time of being laid out as a part of Youle Street by Pratt as represented on said plan, remained open, and was travelled over, without objection, by the defendants and others going in or out of said town way, until 1856, when the

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plaintiff erected a fence on the northerly side of said town way, and within the limits of Youle Street as laid out and represented on said plan, extending to Vinton Street; and the defendants requested him to remove so much of said fence as was within their limits, which he refused to do; and the defendants then removed that portion of the fence, and placed it upon the plaintiff's adjoining land, and entered upon, and ploughed up, and made into a street or way for travel, a portion of the land lying between the northerly line of said Youle Street as laid out and represented on said plan and the northerly line of said town way, without injury to the adjoining land of the plaintiff.

J. Dana & W. C. Farnsworth, for the plaintiff. 1. James Pratt, by laying out a street through his land, opening it to public travel, and selling lots bounding thereon, did not make a mere private way, nor grant mere private easements; but impliedly made an offer to dedicate such street to public use. *Hobbs* v. *Lowell*, 19 Pick. 405. *Bowers* v. *Suffolk Manuf. Co.* 4 Cush. 332. *Commonwealth* v. *Fisk*, 8 Met. 238. *Underwood* v. *Stuyvesant*, 19 Johns. 181. *Wyman* v. *Mayor &c. of New York*, 11 Wend. 486. Some acts were necessary on the part of the public to indicate their acceptance of the street dedicated to their use. 2 Greenl. Ev. § 662. *Larned* v. *Larned*, 11 Met. 421. *Bowers* v. *Suffolk Manuf. Co.* 4 Cush. 332. *Hemphill* v. *Boston*, 8 Cush. 195. St. 1846, *c.* 203. In this case, the town, by accepting part only of the street, unequivocally rejected the other part.

2. There are no express grants or covenants in Pratt's deeds of any right of way or street; nothing to show that the plan was referred to for the width of the street; the description of Youle Street as "a forty feet street" excludes all implication of intent to grant or covenant anything more; and the use of the word "street" (meaning in New England a public highway) excludes any intent to grant a private right of way.

3. The utmost extent of any estoppel by Pratt's deeds is to preclude Pratt or his representatives from denying that there was at the time of their execution and delivery of the deeds such a street as was designated by them. If there was then

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such a street existing as was laid down on Pratt's plan, the town might afterwards alter or discontinue it, and did discontinue the part not included within the forty feet of width. *Commonwealth* v. *Westborough*, 3 Mass. 406. *Valentine* v. *Boston*, 22 Pick. 75.

4. The alteration of Vinton Street by the county commissioners relieved a piece of land adjacent to the premises from the servitude of the public right of way, placed a permanent obstruction to the use of any way over the premises, and would therefore extinguish any private way in the premises. *Hancock* v. *Wentworth*, 5 Met. 446.

S. Wells & J. Humphrey, for the defendants.

This case was decided in June 1858.

Dewey, J. The position taken by the defendants, that where land is conveyed which is situate on a street or way, and reference is made in the deed of conveyance to a plan on which said street is delineated, the plan exhibited at the sale, and subsequently recorded by the grantor in the registry of deeds, is made a part of the deed, and estops the grantor and those claiming under him to deny the existence of the street as delineated on the plan, is well maintained by authority and sound in principle. *Morgan* v. *Moore*, 3 Gray, 319. *Thomas* v. *Poole*, 7 Gray, 83. *Rodgers* v. *Parker*, *post*, 445. *Livingston* v. *Mayor &c. of New York*, 8 Wend. 98.

That the facts stated bring the present case within the rule is also very clear. Both parties claim title under James Pratt; the defendants by a title prior in time, if their deed will avail them to the extent claimed. Before making his deed to the defendants, Pratt caused to be made a plan of certain real estate owned by him, laying out the same into streets and house lots, and sold the lots so laid out by public auction, using and distributing such plan at the time and place of sale. A copy of said plan was duly entered upon the books of the registry of deeds. Pratt, in his deed of certain lots, including this, to Lucius Beebe, the grantor of the defendants, made a reference to said plan, and recited that "a copy of said plan is deposited in the registry of deeds for the purpose of reference," and the

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land conveyed was also bounded on streets laid down and described on the plan.

If the streets, as laid out and delineated on the plan, are, by the effect to be given to such plan, and the deeds referring to it, to be kept open as streets to the extent in width delineated on the plan, and the right to demand this attaches to the owners of lots not only as to so much of the street as the particular estate of each individual is bounded upon, but also to all the lots in the same tract or parcel, the defence is well maintained. In the opinion of the court, such would be the rule as applicable to the case of a sale of house lots described upon a plan with streets accompanying the same.

As to the question presented in this broad aspect there can be no doubt. The only ground for doubt in the present case is that arising from the particular description in the deed, "beginning at a point on a forty feet street laid down on said plan and called Youle Street." It is urged on the part of the plaintiff that the deed of Pratt to Beebe, and the rights acquired under the same, are fully satisfied by leaving a street forty feet in width; and therefore that all beyond forty feet might be withdrawn from the street or avenue, and attached to any adjacent lots, or be inclosed by a fence. It is admitted that, in reference to the particular parcel of land conveyed to Beebe, the width of the street immediately adjacent to the land conveyed was described on the plan as forty feet. But above the lots sold to Beebe, the lines of the street, as laid down on the plan, diverged, and exhibited the easterly part of Youle Street as seventy feet in width, indicating the eastern entrance from Vinton Street upon Youle Street to be of that width. The plan exhibited a location of twenty-three lots offered for sale, all located on the plan with accompanying streets. Upon the plan will be found, in reference to certain other streets, a memorandum "that the lines may vary slightly from the plan;" but no such suggestion is indicated as to Youle Street. On the contrary, the location of lot No. 16, the more eastern of the lots, and that extending to Vinton Street, indicates by its southerly line being drawn parallel to the deviated line in Youle Street, where it is extended to sev-

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enty feet, that Youle Street was to be permanently as laid down on the plan, and of the width of seventy feet at the entrance from Vinton Street, and gradually diminishing to forty feet.

The locations on the plan, as exhibited at the time of the sale, and recorded in the registry of deeds, and referred to in the various deeds, accompanied by the other circumstances which we have stated, must fix the rights of the purchasers of these lots and of each of them to have Youle Street kept open of the width indicated by the plan.

The next inquiry is, whether the location of a town way of the width of forty feet, embracing so much of the wide street delineated on the plan, does not limit the rights of those holding under Pratt's deeds to a street of forty feet in width, and thereby restore to Pratt the entire interest in the residue disincumbered from the easement fixed upon it by the plan making it a part of Youle Street and an open avenue. We think it does not have that effect. The right to have a street of the width and in the direction indicated in the plan was a part of the contract between Pratt and his grantees, the purchasers of the twenty three lots delineated on the plan, with their accompanying streets.

The suggestion on the part of the plaintiff that this was nothing originally but a dedication of land to the public for a public way, and that the public authorities having only accepted and located forty feet of the same as a way, the residue reverts to the original owner, is not well authorized. The rights of the purchasers of house lots bounded by the streets laid out on this plan are something more than a dedication to the public, to be accepted or rejected at the discretion of the public authorities. The streets delineated on the plan were secured to them and their estates, irrespective of their being laid out by any public authority. The rights of those purchasing land on Youle Street were coextensive with the street as laid out on the plan, and were not diminished by reason of a part of the space being afterwards embraced in a located public way.

The action of the county commissioners, making an alteration in the line of Vinton Street near Youle Street, does not

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affect the rights of the defendants as to Youle Street being kept open. It may materially affect the value and importance of the easement, but not the right itself.

Judgment for the defendants.

SAMUEL M. PETTENGILL *vs.* EDWARD W. HINKS & another & Trustees.

Evidence of a submission by the assured and an agent of the insurers of the amount of a loss by fire to arbitration is not sufficient evidence of a waiver of a condition in a policy of insurance requiring a particular account of the loss, to charge the insurers in foreign attachment as trustees of the assured, if they state in their answers that they have never waived the conditions of the policy.

TRUSTEE PROCESS. The Traders' and Mechanics' Mutual Fire Insurance Company, and the Howard Mutual Fire Insurance Company, both of Lowell in this county, summoned as trustees of the principal defendants, in their answer admitted a loss by fire of property of the defendants in Boston, insured by them; but stated that the defendants had never delivered to them a particular account of the loss, as required by the conditions of insurance made part of each policy. In answer to interrogatories put to them by the plaintiff, they further stated that they had notice of the fire from an agent of theirs; that an officer of each company visited and examined property injured by the fire, and, for the sole purpose of ascertaining the extent of the injury while the fire was recent, agreed to the appointment of three persons to estimate it; but that he did not intend to bind the company by such appraisal, or to waive any of the rights of the company, and had no authority to bind them by a submission to arbitration, and that the company never assented to the appointment of arbitrators.

At the trial in the court of common pleas, the plaintiff called a witness, who testified that he was called upon to act as arbitrator on the part of the plaintiff between him and the insur-

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ance companies, and met at the place of the fire those officers, and an arbitrator selected by them on the part of the companies, who together with the witness selected a third, and those officers agreed to abide their decision; that the witness looked at the policies, and remarked that they provided another mode of assessing damages and giving notice, and said officers said it would make no difference, that they were anxious to ascertain the loss as they wished to pay up; that the arbitrators made an award with which the officers were satisfied, and one of them said he was going to Lowell, and should settle the matter.

The trustees called the officers, who were permitted, against the plaintiff's objection, to testify that they did not waive any of the conditions of the policy, and had no authority to make a final settlement of the loss, and said so at the time of said meeting.

Upon the trustees' answers and this evidence *Bishop*, J. discharged the trustees, and the plaintiff excepted.

R. F. Fuller, for the plaintiff.

S. A. Brown & B. Dean, for the trustees.

Merrick, J. It is conceded by the plaintiff, that after the occurrence of the injury by fire to the insured property, no such notice as is made requisite by the provisions of the policies to render them liable for the loss was ever given to either of the corporations who are summoned as trustees; and that they are therefore entitled to be discharged, unless by the acts and proceedings of their officers their right to such notice was virtually waived. Such provisions respecting the notification of a loss were undoubtedly for the benefit of the insurers, who could, of course, if they should see fit to do so, dispense with its being given. And they may waive it in express terms, or it may be assumed as a fact if it is a result by necessary implication from their acts or the acts and conduct of their officers. *Clark* v. *New England Mutual Fire Ins. Co.* 6 Cush. 342. *Underhill* v. *Agawam Mutual Fire Ins. Co.* 6 Cush. 440. But the difficulty with the plaintiff's case is that there has been no waiver; and no transactions from which, in connection with the proofs by which they are surrounded, a fact of that kind can legitimately be

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inferred. The answers of the trustees are to be taken to be true; and both corporations in their answers expressly declare that they never waived or intended to waive the benefit, secured to them by the provisions in the policies which they issued, concerning the notice to be given them by the insured in case of loss. There is some apparent, and perhaps real, conflict in the testimony of the witnesses, which has been put into the case by the parties in addition to the answers of the trustees; but, fully considered, it is certainly impossible to conclude from this testimony, contrary to the statements of the trustees as made in their answers, that they did in fact dispense with the requirement of the notice provided for. And as the requisite notice was in fact never given, and is not affirmatively shown to have been waived, it follows that no action could have been maintained against the insurers to recover the amount of the loss; and consequently that they cannot be adjudged to have had any goods, effects or credits of the defendants in their hands when the plaintiff's writ was served upon them.

Trustees discharged.

WILLIAM S. LELAND & others, Trustees, *vs.* CHARLES F. ADAMS, Trustee.

The word "estate," in a will made before the Rev. Sts. c. 62, § 4, although accompanied by words of locality, passed a fee, unless controlled by other parts of the will.

A fee passed by the following devise, made before the Rev. Sts., although words of inheritance were annexed to other devises in the same will — "To A. I give and devise all my lands and tenements in W., with the privileges and appurtenances to the same belonging, containing four hundred acres, be the same more or less. This estate was formerly the property of G., and I now devise it as a token of my respect for the devisee, and in consideration of his services in directing the education of my two grandsons."

WRIT OF ENTRY to recover land in Weston. Both parties claimed title under the will of Ward Nicholas Boylston, executed in 1826, and proved in 1828, which contained this devise:

"To His Excellency John Quincy Adams, one of my execu-

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tors, I give and devise all my lands and tenements in Weston, in the county of Middlesex, Massachusetts, with the privileges and appurtenances to the same belonging, containing four hundred acres, be the same more or less. This estate was formerly the property of Lt. Gov. Gill, and I now devise it as a token of my respect for the devisee, and in consideration of his services in directing the education of my two grandsons, Ward Nicholas and Thomas, sons of John Lane Boylston."

Said will contained no other specific devise of these lands; but, after various other legacies and devises, (in some of which he used words of inheritance,) gave, devised and bequeathed to trustees, (whose successors the demandants were,) "all my estates, both real and personal, with all the privileges and appurtenances to the same belonging, wherever the same may be found, not otherwise herein absolutely and specifically devised and bequeathed: To have and to hold the said real estate, and to possess said personal property, to them and to the survivors or survivor of them, and their successors, to be appointed as herein provided for, as joint tenants in fee, and not as tenants in common," upon certain trusts.

John Quincy Adams was appointed by the will one of the executors thereof, one of said trustees, and sole guardian of said grandsons of the testator, and accepted all these trusts, and entered upon the land mentioned in the specific devise to him, and devised it to the tenant.

The case was submitted to the decision of the court, and argued in writing, upon a statement of facts, so much of which as is material to the point decided is above stated. So much of the statement and arguments as does not relate to that point is omitted.

E. R. Hoar & W. Dwight, for the demandants. At the time when this devise took effect, a devise of lands and tenements, without words of limitation, gave the devisee only a life estate. 2 Jarman on Wills, 172. *Hawley* v. *Northampton*, 8 Mass. 3. *Wait* v. *Belding*, 24 Pick. 133. *Doe* v. *Baines*, 2 Cr., M. & R. 26. *Doe* v. *Roberts*, 7 M. & W. 387. Co. Lit. 9 *b*. Such a devise would not give a fee, unless there were other words in the

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will to show the testator's intent to pass a fee; or unless the devise was for some purpose which could not be effected without a larger estate than an estate for life. *Bowers* v. *Porter*, 4 Pick. 203. *Baker* v. *Bridge*, 12 Pick. 32. There are no words in this will, enlarging the estate devised into a fee. The word "estate" is, by its reference, restricted to the antecedent words of devise. It is a word of reference, and means no more than the words to which it refers. *Doe* v. *Clayton*, 8 East, 144.

The use of apt and technical words to pass a fee, where such was the purpose, in other parts of the will, makes it clear that the testator understood the force of words of limitation; and requires the court to give effect to their omission. *Roe* v. *Holmes*, 2 Wils. 80. *Cook* v. *Holmes*, 11 Mass. 532.

F. E. Parker, for the tenant. The testator by this devise intended to pass the fee. This appears

1. From the omission to devise the remainder specifically, and by comparison with the rest of the will. *Gleason* v. *Fayerweather*, 4 Gray, 348. The residuary devise to trustees is not of reversionary estates, but of lands, as is shown by its being in the plural; by the "wherever found;" and by the *habendum* "as joint tenants in fee" — which could not be said of a fee or other technical estate.

2. From the use of the word "estate," which "shall carry a fee, where the testator has a fee, unless the intention is broken in upon by other expressions in the will, clearly shewing that it is intended to give it a more limited construction." *Doe* v. *Lawton*, 4 Bing. N. C. 461. *Brown* v. *Wood*, 17 Mass. 68. *Godfrey* v. *Humphrey*, 18 Pick. 539. *Kellogg* v. *Blair*, 6 Met. 325. *Tracy* v. *Kilborn*, 3 Cush. 558. "And it is now settled, that the word 'estate' will carry the inheritance, though it be accompanied by words of locality, or other expressions referable exclusively to the *corpus* of the property." 2 Jarman on Wills, 181. *Lambert* v. *Paine*, 3 Cranch, 98. *Doe* v. *Lawton*, 4 Bing. N. C. 455. *Chichester* v. *Oxendon*, 4 Taunt. 176. *Roe* v. *Wright*, 7 East, 259. *Gardner* v. *Harding*, 3 Moore, 565. *Stewart* v. *Garnett*, 3 Sim. 398. Nor is the word "estate" restricted by being used as a word of reference to other words of locality. *Roe* v. *Bacon*,

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4 M. & S. 366. *Uthwatt* v. *Bryant*, 6 Taunt. 317. *Randall* v. *Tuchin*, 6 Taunt. 410.

In this will, the first clause does not complete the devise, but is used to ascertain the locality; while the second clause makes certain the quantity of the estate and the motive of the devisor, and the operative words, "I now devise," are there again employed.

Hoar & Dwight, in reply. The case of *Gleason* v. *Fayerweather*, 4 Gray, 348, was decided under the provisions of the Rev. Sts. *c.* 62, § 4, which have reversed the rule of construction in force when this will was made and proved.

The rule, as stated in *Randall* v. *Tuchin*, 6 Taunt. 416, is that "the word estate" must be "used in the operative part of the devise; not introduced incidentally after the devising part is perfected, but introduced in the devise itself." And in all the cases cited by the tenant the word estate is not a word of reference, but is the word of devise; and the cases go upon that distinction.

The word relied upon in the present case occurs in an independent and separate sentence, stating an immaterial circumstance in the history of the farm, and expressing the testator's respect for the devisee, and acknowledgment of the devisee's services in directing the education of his grandsons. It is a word used in the statement of a former ownership, and not of the ownership or title which is the subject of this devise.

If the devise in question was of a life estate, then the remainder was an estate "not otherwise herein absolutely and specifically devised."

Metcalf, J. The will of Mr. Boylston, having been made in the year 1826, before a new rule for the construction of devises of land was prescribed by the Rev. Sts. *c.* 62, § 4, must be construed by the rules of law which were in force when it was made. And we are all of opinion that by that will, so construed, Mr. Adams took a fee in the premises demanded in this writ. As we view the devise to him, its meaning and effect are the same as they would have been if the words of it had been arranged thus: "I give and devise all my lands and tene-

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ments in Weston, in the county of Middlesex, Massachusetts, with the privileges and appurtenances to the same belonging, containing four hundred acres, be the same more or less, which were formerly the estate of Lt. Gov. Gill, and which estate I now devise in token of respect for the devisee." We view the second sentence in this devise, as it stands in the will, not as introduced incidentally after the devising part was perfected, (as in *Doe* v. *White*, 1 Exch. 535,) but as an operative part of the devise. In that sentence, the devisor expressly repeats the devise of the "estate" which, in the first sentence, he devised by the words "lands and tenements." Both must be taken together.

The word "estate," in a devise, has repeatedly been held sufficient to give a fee, if the devisor had a fee, although the word is accompanied by words of locality, (as in this case,) or other expressions exclusively referable to the *corpus* of the property. *Doe* v. *Lawton*, 6 Scott, 318, and 4 Bing. N. C. 461. In *Randall* v. *Tuchin*, 2 Marsh. 117, Chief Justice Gibbs thus states the law on this subject: "It is admitted very properly, that the word 'estate' or 'estates' will carry a fee, unless the other parts of the will restrain the effects of it. Formerly, a narrower construction prevailed, and it was held that if the word 'estate' were attended by words designating the thing devised, or its situation, it was to be considered not as descriptive of the interest intended to be passed, but only of the lands themselves which were the subject of the devise. Latterly, however, a more liberal construction has been adopted; and the word 'estate,' though it be followed by words which point at the situation, or at the particular house or land, has been held to convey a fee simple. It may be restrained; it may be shown by other parts of the will, that the testator has used the word 'estate,' as descriptive only of the thing devised, and not of the interest meant to be conveyed; but then it lies on the party who contends for this narrow construction, to show that there are such words of restraint in the will." In this case of *Randall* v. *Tuchin*, which is reported also in 6 Taunt. 410, C., after devising several dwelling-houses to T., (particularly describing them,)

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added these words: "All which estates, being copyhold of the manor of Kennington, I devise to T. for life, and, after his decease, to his son M." It was decided that M. took an estate in fee in the copyhold. So in *Roe* v. *Bacon*, 4 M. & S. 366, B. devised to his wife thus: "All and singular my freehold lands, messuages and tenements at T. & H., or elsewhere, together with all my household goods, cattle," &c. "for her natural life, and after her decease, then all the said estates, goods," &c. "to be divided among my sons, T., J., H. and P., and my son-in-law C., share and share alike." Lord Ellenborough and his associates decided that the sons took a fee, after the death of the wife. In *Uthwatt* v. *Bryant*, 6 Taunt. 317, and 2 Marsh. 30, A. devised all his freehold lands, tenements, hereditaments and premises in the parish of B. to certain persons for life, with remainders over, and on the happening of a certain event, devised his said freehold estate in the parish of B. to his daughters, as tenants in common, and if they should die in the lifetime of his wife, then he devised all his said freehold estate in the parish of B. to his wife and her heirs forever. Chief Justice Gibbs and his associates certified their opinion to the Vice Chancellor, that the daughters took a fee. These cases are decisive that the word "estate," even when used in a will as a word of reference, will carry a fee, unless other parts of the will show that such was not the testator's intention. In the present case, the whole will clearly tends to show that Mr. Boylston intended to give the Weston lands to Mr. Adams in fee. But we place our decision on the grounds and authorities above mentioned, without seeking other reasons in confirmation of it.

Judgment for the tenant.

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Ignatius Tyler & others vs. Joshua Mather.

On the death of some of the complainants, pending a complaint on the Rev. Sts. c. 116, for flowing land, the survivors alone may prosecute the suit, though some of the deceased complainants were tenants in common with some of the survivors.

On a complaint upon the Rev. Sts. c. 116, the respondent, under a plea of the general issue, with a specification of defence that he has a right to keep his dam at the height complained of, cannot at the trial deny the complainant's title to the land flowed.

On the trial of a complaint for flowing land, the declaration of a former owner of the dam that a certain stone marked the height of his right to flow, is admissible in evidence for the complainant, without proof that such declaration did not refer to other land above the dam and below the land of the complainant.

On the trial of a complaint for flowing land, brought in 1850, the defence to which is prescription since 1823, evidence is not admissible that a former owner of the dam paid money in 1838 as damages for flowing land other than that of the complainant.

On the trial of a complaint for flowing land, brought in 1850, the defence to which was prescription since 1823, the complainant gave in evidence a deed made in 1837, of land above the dam, granting to the owner of the dam a right to flow the land to a certain height. *Held*, that the owner of the dam might show that the flowing mentioned in the deed was caused by raising the dam in 1823, and that annual damages had been paid therefor to the grantor from 1823 to 1830.

On the trial of a complaint for flowing land, the respondent may prove that a causeway above the dam and below the land flowed, by reason of having been raised since the commencement of the suit, operates as a dam.

Upon the trial of a complaint for flowing land, a witness called by the respondent testified on cross-examination that the complainant and other owners of the land flowed chose a committee to procure a survey of the stream. *Held*, that this did not authorize the respondent to give in evidence the report of the committee, or the fact that such landowners subsequently cleared out the stream.

On the trial of a complaint for flowing land, a declaration of the warrantor and grantor of the respondent (who has assumed the defence of the suit) as to the right of flowing, is not admissible in evidence, if made when he had no interest either in the dam or the land above it.

On the trial of a complaint for flowing land, brought in 1850, the respondent contended that his dam had not been raised since 1823, and that he had a right to maintain it as it then stood; and the complainant contended that it had been raised since 1832. The court instructed the jury that if the dam had existed for any twenty years previously to the date of the complaint at the same height at which it then stood, they should find for him; but if it had not been maintained at said height for any twenty consecutive years previously to said date, they should find for the complainant; and no objection was made to the instructions at the time. *Held*, that the respondent had no ground of exception.

Complaint on Rev. Sts. c. 116, entered at September term 1850 of the court of common pleas, and alleging that the respondent had maintained and kept up a dam across Hale's

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Brook in Lowell since the 23d of February 1850, and thereby flowed and injured the lands of the complainants.

The respondent answers "that he will claim a trial before a jury of this honorable court, at the bar of said court, and for specification of his defence at such trial says, 1st. He will plead the general issue, and rely upon any and all matters in defence which he is legally entitled to avail himself of under that plea. 2d. He further says, that he has a right to keep up his dam at the height it had been during the time complained of, and to raise and flow back the water thereby, without paying compensation or damages therefor."

Before the trial the deaths of four of the complainants were suggested, but there was no appearance of any of their representatives. The respondent pleaded the general issue, concluding to the country; and the complainant joined the issue.

At the trial at September term 1857 before *Morris*, J., the respondent objected to proceeding upon the then state of the complaint and pleadings; particularly as one of the deceased complainants was tenant in common with one of the survivors and another of the deceased complainants was tenant in common with two others of the survivors, and damages were claimed for the whole land thus held in common. But the judge allowed the complainants to proceed without amendment.

After the complaint was read, the respondent called upon the complainants to prove their title to the land alleged to be flowed. The complainants contended that this was not a civil action; that no general issue could be pleaded in it, but the respondent must plead his defence specially in bar. But the judge ruled that, under the pleadings in the case, the complainants need not prove title to the lands flowed.

It appeared that the dam of the respondent was built across Hale's Brook, and that a dam had existed upon the same spot before the beginning of this century; and that in 1823 Moses Hale, a former owner of the dam and mill privilege, built a dam upon the site of the old dam which raised the water at that point higher than it had been before that time. There was con-

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flicting evidence upon the question whether the dam had been altered since 1823 so as to raise the water higher, except temporarily from 1836 to 1840.

The complainants were permitted, against the respondent's objections, to prove that Hale, before 1827, pointed out a stone in the pond to one of his workmen as a water mark of his right to flow the meadows, saying that said stone was the mark for him to keep his water at; and directed him, when the water rose above the stone, to hoist the saw-mill gate and work the water down to the stone.

The complainants were also permitted, against objection, to introduce testimony that the former proprietors paid money during the years 1836, 1837 and 1838, as damages for flowing and for the purchase of other land bounded on this brook, which the witness stated, on cross-examination, was to avoid law suits and own the land.

The complainants offered a deed from the heirs of Butterfield, dated December 20th 1837, granting to the former proprietors of the dam the privilege of flowing their lands to a certain height named in the deed, and proved the deed by a witness. The respondent offered to prove by the same witness that the flowing mentioned in the deed was caused by raising the dam in 1823, and that annual damages had been paid therefor to the ancestor of said heirs from 1823 to the time of his death, prior to 1830. But the judge rejected this testimony.

It appeared that a causeway across the meadows of the brook connected with a bridge over the stream had been raised since the commencement of this suit; and the respondent offered to show that it now operated as a dam, upon the stream, by tests and observations made since the service of the complaint. But the court rejected the evidence.

A witness called by the respondent having testified on cross-examination that in 1832 the owners of the meadows chose a committee to procure a survey of the brook and the taking of levels upon it; the respondent offered in evidence the report of said committee, showing the action of the meadow owners, (among whom were several of these complainants,) and that

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they, by a subscription among themselves, cleared out the brook. But the judge ruled the report inadmissible. The certificate of said levels was afterwards put in by the complainants without objection.

Oliver M. Whipple, the respondent's grantor and warrantor, had taken upon himself the entire defence of this suit. The complainants, in order to prove that the proprietors of the dam complained of kept the water back by raising their dam, and so deprived him of the usual and natural run of the stream, offered testimony that Whipple in 1837 or 1838 owned the privilege next below this dam, and had leased it to the witness, and told him that the owners of the dam complained of had no right to raise the water above a certain rock in the pond, because they had raised their dam. The respondent objected to the evidence of the declaration of Whipple, because it did not appear that at the time of making the declaration he had any connection with or interest in this dam or privilege. But the judge admitted the testimony.

Upon all the testimony in the case the complainants contended that the dam had been raised since 1832; and the respondents contended that it had not been raised since 1823, and that they were entitled to maintain it at the height at which it then stood and at which it stood at the date of the complaint.

The jury returned a verdict for the complainants under the following instructions: "If the respondent had shown that his dam, as it stood on the date of the complaint, had existed at the same height for any twenty consecutive years previously to that time, their verdict should be upon the pleadings for the respondent; but if it had not been maintained for any such period at the height at which it stood on that day, no prescriptive right had been gained, and they should find a verdict for the complainants."

The respondent made no objection to these instructions at the time, and did not request any different instructions upon this point; but at the hearing in this court upon exceptions to the rulings and instructions at the trial, contended that the jury

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should have been instructed that the respondent had a right to maintain his dam as it existed in 1823, the time of its being rebuilt, and in 1830, twenty years before the date of the complaint; and that as the bill of exceptions showed that he had taken this ground at the trial, it was the duty of the judge to have instructed them upon this point.

T. Westworth, for the respondent.

B. F. Butler & D. S. Richardson, for the complainants.

MERRICK, J. 1. The objection interposed by the respondent, after the death of several of the persons who had originally been joined as complainants in the complaint had been suggested, that the remaining complainants could not in the then state of the complaint be maintained, was rightly overruled. The provisions of the statute upon this subject are decisive of the question. It expressly declares that no complaint for the flowing of lands by the owner of a mill shall be abated by reason of the death of any party thereto, but may afterwards be prosecuted or defended by the surviving complainants or respondents, or by the executors or administrators of the deceased. Rev. Sts. *c.* 116, § 43. This positive regulation is a sufficient answer to the objection, and to the suggestion concerning the supposed difficulties which may arise in the final protection and adjustment of the respective claims of the several parties. If the complainants shall succeed in maintaining their suit, it will be within the authority of the court to direct the entry of the judgment in such form as may be found necessary to secure the rights of all persons who are interested in it.

2. The respondent had no right, under the pleadings in this case, to insist that the complainants should prove their title to the premises described in the complaint, nor were they required to produce any evidence in relation to it. In processes instituted under its provisions, the statute allows any matter to be pleaded in bar, which will show that the complaint cannot be maintained. It is to the issue which is raised upon the pleadings thus authorized, that the trial in court and the evidence produced thereon are to be confined. The respondent availed himself of the privilege to which he was entitled, by pleading the general issue,

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and filing at the same time a specification of defence in which he set forth that he had a right to keep his dam, and flow back the water raised by it, up to the height at which it had at any time been during the whole of the period wherein it was alleged that it had been the cause of injury or damage to the complainants. This specification indicated the only matter of defence upon which he intended to rely, and limited him upon the trial to inquiries concerning, and an investigation of, that question only. He had no right under his plea, restricted as it was by an allegation of a special ground of defence, to insist upon or to avail himself of any other. Rev. Sts. *c.* 116, § 9. St. 1836, *c.* 273. *Henderson* v. *Adams*, 5 Cush. 611.

3. The testimony concerning the representations of Hale, as to the extent of his claim of right to flow the meadows above his dam, was properly admitted. At the time he made the statements which were put in evidence by the complainants, he was the owner and occupant of the mill and dam; and it is in part through, under and by means of his occupation, and of his exercise of the rights of flowing claimed by him as such proprietor, that the respondent attempted to show that the right to flow the lands above the dam, as alleged in his specification, had been gained by prescription. It was suggested by his counsel at the argument, that there were other meadows above the dam, beside the lands belonging to the complainants, to which it was at least possible that Hale referred in the directions which he gave to the persons in his employment. If this were so, it would afford no sufficient reason for the exclusion of the evidence, but would be only a matter for the consideration of the jury in estimating its value and effect. 1 Greenl. Ev. § 189.

4. The evidence which the complainants were allowed to introduce for the purpose of showing that former proprietors of the mill paid money in the years 1836, 1837 and 1838 to owners of lands, other than the premises described in the complaint, for the purchase, and for the payment of damages occasioned by the flowing thereof, should have been excluded. Such payments for such purposes had no relation to the precise question at issue between the parties. The exceptions do not disclose, nor

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do any inquiries appear to have been made at the trial to ascertain what their rights in relation to those other lands respectively were. And without such explanation it is obvious that these payments could have no tendency to prove what was the height of the dam in the year 1823, or whether it had subsequently been in any manner changed. These facts would only show that certain landowners claimed compensation for some injury alleged to have been occasioned by the inundation of their lands, and that their claims were acquiesced in and submitted to by the proprietors of the mill; but would afford no evidence, either of the degree of damage actually sustained, or of the height of the dam by which it was produced. Even if it was as high in 1823 as it was when those purchases and payments were made, or as it has been at any subsequent period, it is not pretended that the respondent had at that time acquired a prescriptive or other right to flow the lands of the complainants by means of a dam raised to that height. If any one of the complainants had as early as the year 1838 required the payment of compensation for damages caused to their lands by the maintenance of such a dam, it is perfectly clear that the defence now interposed and relied on could not have been resorted to; for if the respondent has any such right as that upon which he insists, it has been acquired by an uninterrupted adverse occupation, which commenced before, and has been perfected only by long subsequent enjoyment.

5. The testimony of the witness, by whom the execution of the deed from the heirs at law of Butterfield to the former proprietors of the mill, introduced by the complainants, was proved, which was offered by the respondent to show that the flowing mentioned in that deed was caused by increasing the height of the dam in 1823, should have been admitted. The respondent contended that the dam had never been increased in height at any time subsequently to that year. But this deed from the heirs of Butterfield might, if the description contained in it was left unexplained, have been considered as affording some evidence that the height of the dam was increased at a later period; and that it was this increase which caused the damages for which

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payments were made annually during the life of Butterfield, and for the release of any future claims to which that deed was executed. It was therefore clearly within the right of the respondent to show that all those damages were caused by the dam just as it stood in 1823, and not at all by any addition which was subsequently made to it.

6. The evidence as to the observations made and the tests applied to ascertain the effect of the causeway in the interruption of the passage of the water, and the consequent flooding of the lands above it, though after it had been raised more and higher than it had formerly been constructed, and since the institution of this suit, should have been admitted. It would very plainly be directly applicable to the subject of inquiry involved in the issue, if the respondent should also show how much the causeway had in fact been raised in height, because, upon that proof, a comparison could readily be instituted as to its effect both before and after its increase. And this, though it is not so expressly asserted in the bill of exceptions, but only results by implication from its statements, we understand to have been the purpose of the respondent; and it is in this view that the ruling by which the evidence was rejected is held to be erroneous.

7. The report of the committee appointed by the owners of the meadows bordering on the stream, and the evidence of their action in clearing out the brook in 1832, which were offered by the respondent, were wholly irrelevant to the question upon which the parties were at issue, having no tendency to show that any change had been made in the height of the dam since 1823, but only that the owners attempted to prevent their lands from being injuriously affected by water raised by it in its then existing condition.

8. The ruling that the declarations of Whipple, made under the circumstances stated in the bill of exceptions, were admissible, was erroneous. At the time when he had the conversation of which testimony was allowed to be given to the jury, he had no interest of any kind in the mill or dam or lands above it It is true that he has now taken upon himself the defence of

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the suit, and has become responsible to the respondent for whatever judgment may be rendered in it against him. But the principle which makes the admissions of persons, not parties to the record, yet interested in the event of the suit, competent evidence, restricts the proof to such statements and declarations only as were made at times when they had some interest in the matter in controversy. 1 Greenl. Ev. § 180. Applying this restriction to the evidence of the declarations of Whipple, it is obvious that those which were proved, having been made before his interest accrued, were inadmissible and should have been excluded.

9. The respondent has no cause of complaint, which he can now be allowed to urge, against the instructions given to the jury in relation to the time within which a right to flow the lands of the complainants could have been acquired. He made no objections whatever upon the subject at the trial. He did not then suggest any dissatisfaction with those instructions, or request any modification of them by the court. This silence must be taken to have been intended as a signification of his acquiescence in the correctness and propriety of the rule as applicable to the facts in evidence and the course of proceeding on the trial. But even if this were otherwise, the instructions, when considered in that view, were we think sufficiently full and explicit, and well adapted to the question at issue which was submitted to the jury.

Some part of the rulings of the court, objected to by the respondent, being erroneous, the exceptions must be sustained, and a *New trial ordered.*

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NATHANIEL JOHNSON *vs.* JAMES WYMAN & another.

It seems, that a laying out of a highway, in terms, as an alteration of a former way, discontinues the old way between the ends of the new one. But in the absence of any record of the laying out of either way, evidence of the construction and subsequent repair of the new way by public authority does not necessarily presuppose the discontinuance of the old one.

ACTION OF TORT for breaking and entering the plaintiff's close in West Cambridge and removing a building therefrom. Answer that the building stood upon and wholly obstructed a public highway, leading from West Cambridge to Charlestown, called the Old Charlestown Road, to the great nuisance of the defendants; and was abated and removed by them with all reasonable care.

At the trial in the court of common pleas, the defendants introduced evidence tending to show that seventy years ago a road, which was the only highway from the North Parish in Cambridge over Winter Hill to Charlestown, passed over the place of the alleged trespass; that about fifty years ago a road, known as Charlestown Street, was laid out in a direct line, about a third of a mile in length, across a bend in the old road, shortening the distance, and about five rods in the widest part from the old road; that the town school-house previously stood by the old road, and also four or five dwelling-houses, and that since the laying out of Charlestown Street the old piece of road had been used by the occupants of these houses and others having occasion to pass to and from them. But there was no evidence of this use being confined to any particular line, or of any continued use along the road. And it appeared that the occupants of the houses had other means of reaching Charlestown Street by passing over their own land; that the whole space between the two roads had until within a few years lain uninclosed and in common; that sand and gravel had been often dug and carried away from it, and there had been at several times and for long periods large holes in the old piece of road, such as to exclude travel therefrom; and there was no

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evidence that either of the towns of Charlestown or West Cambridge had ever recognized the existence of the old piece of road since the establishment of the new one. No record could be found of the location of either road, or of the discontinuance of the old road.

The plaintiff offered evidence tending to show that the new road was originally constructed and wrought for travel by public authority, and had ever since been kept in repair by the towns of West Cambridge and Charlestown, and that since the making of the new road the old road had not been kept in repair or travelled; and contended that it had been discontinued.

The defendants contended that as there was no evidence of the discontinuance of the old road, except what might arise from the location of Charlestown Street, it still continued to be a public highway; and that if it was discontinued as a highway, still those owning property and residing thereon had a private way over the old way to Charlestown Street.

Perkins, J. ruled "that the proper regular and legal laying out and establishment of the piece of way called Charlestown Street, as a public highway, might be proved without the actual production of the record of the laying out; that the jury might take into view all the circumstances proved in reference to the construction and long use of said street or way, the character of such use, the repairs made upon it, and all the other evidence relating to the point; and if from these they were satisfied that there was a regular and legal laying out of said street or way, the legal record of which was lost, destroyed, or for other valid reasons could not be produced, they might so find the laying out; that if the jury should find such regular, legal and proper laying out and establishment of this piece of way or street, then they would look to the circumstances proved, and say whether it was so laid out and established as a new way, or merely as an alteration of the old way; that if they should find it to be merely an alteration of an old way and a substitution of the new piece, then the rule of law was that the establishment of an alteration in a way is a discontinuance of the part altered, or at least so much of the part altered as falls outside

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of the substituted way, unless there was some provision against such discontinuance; that the parts of the old way so discontinued would cease to exist as a public way, as well for those whose houses were located upon it, as for others; that the fact that this piece of road or way had been travelled over as a public highway for a great length of time, by any persons, during its existence as a public highway, would not establish the acquisition of a private right by virtue of such use, which they could claim to enjoy after such discontinuance, either in regard to those whose houses were located on the discontinued way, or to others."

The defendants claimed that the evidence tended to show, that they had acquired a private way along the line of the old road before it was laid out; and the judge ruled "that if such right were established, it would revive to the defendants on the discontinuance of said old way."

The jury returned a verdict for the plaintiff and the defendants alleged exceptions.

B. F. Butler & L. Marrett, for the defendants, to the point that the establishment of an alteration in a way is not a discontinuance of the part altered, cited *Sts.* 1786, *c.* 67, § 4; 1797, *c.* 30; Rev. Sts. *c.* 24, §§ 1, 4, 7, 10, 69, 70, 72–75; Report of Commissioners on Rev. Sts. *c.* 24, note; *Gloucester* v. *County Commissioners*, 3 Met. 379; *Stetson* v. *Faxon*, 19 Pick. 147; *Wales* v. *Stetson*, 2 Mass. 146; 3 Dane Ab. 268.

J. Q. A. Griffin, for the plaintiff, cited *Wright* v. *Tukey*, 3 Cush. 290; *Commonwealth* v. *Belding*, 13 Met. 10; *Commonwealth* v. *Westborough*, 3 Mass. 406; *Commonwealth* v. *Cambridge*, 7 Mass. 158.

Shaw, C. J. The evidence tended strongly to prove the existence of an ancient public highway, on the line of the old road, by prescription. It stands on the foundation of many of the early highways from town to town, of the actual laying out of which there is no record to be found.

The plaintiff having erected a building thereon, the defendants have a right to remove it, as an abatement of a nuisance unless the road had ceased to be a highway in some legal mode.

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The burden of proof was therefore upon the plaintiff to prove a discontinuance of the old highway.

The judge properly left it to the jury to find, from the evidence of user, that the new piece of way was duly established, either by the court of sessions, by the town authorities, or by dedication by the private proprietors; but he did not instruct them, nor did the evidence show, in which of these modes it was established.

It was competent for the jury to find that the new way was laid out in some mode, sufficient, with the lapse of time, to make it a highway. But leaving it to the jury to find whether it was done as an alteration, and then instructing them that if it was an alteration then it follows as a legal conclusion that it was a discontinuance of the old way, we think was submitting a question of fact to the jury without proper evidence.

If it was in terms laid out as an alteration, we think the legal inference drawn therefrom by the judge was correct. An "alteration" *ex vi termini* means a change or substitution of one thing for another. The public authorities have power by law to lay out, discontinue or alter a highway, and therefore when they say in the record of their doings that they make an "alteration" in an existing road from A. at one part of it to B. in another, and over different soil, it may be well concluded that the old one is discontinued. But this arises from the manifest intent, arising from the terms they have used, in connection with the laws under which they acted. But this conclusion cannot be drawn in a case where there is no record to show what they intended to do.

Whether, in the absence of all record evidence, it would be competent for a jury to find that the authority acting in such case, whatever it may have been, intended to alter and discontinue a section of a public way in opening another or not, it may not now be necessary to decide; but if it would be, it must be a distinct question of fact, to be decided upon appropriate evidence, expressly bearing upon the fact of discontinuance, such as closing up with barriers the ends of the old road, at the termini, the continuance of such barriers for a length of time, and

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similar facts. The circumstance that the old line of road along the arc was little used, is accounted for by the fact that the proprietors thereon and persons going to their houses had practical access, over other private land, by courtesy, to which however they had no legal right. Mere nonuser under these circumstances, and so the failure of town authorities to repair it, seem to us to have little bearing on this question of intent to discontinue. The evidence, as far as it goes, had a contrary tendency, especially the fact that several dwelling-houses directly depended on this part of the old road, which would be accommodated by leaving the old section of the road open, though the straightening was of great convenience to the general travel. The two cases from Massachusetts Reports, which tend to show that the expression "alteration" in terms implies a discontinuance of the way superseded, are quite consistent with this decision, where there is no record and no such expression; and the rule manifestly applies only to cases wherein it is quite apparent that the continuance of the old section of road, by the establishment of the new, would become useless. As the evidence stands on the bill of exceptions, the court are of opinion that there was no sufficient evidence, in the absence of all records, to warrant the jury in finding that this was intended to be technically an alteration, or otherwise operate as a discontinuance of the old road. *New trial granted.*

NATHANIEL SNOW *vs.* GEORGE CLARK & others.

A nonresident owner of real estate may be arrested for nonpayment of taxes thereon, after due demand upon him, and failure of the officer upon diligent search to find any goods belonging to him or on the estate.

An officer, who returns upon a warrant for the collection of a tax, assessed upon real estate to a nonresident owner thereof, that, "having made diligent search for goods of" the said owner "and for goods upon the said real estate, whereon to levy this warrant," he arrested the said owner, does not make himself liable as a trespasser, by not more distinctly stating that he was unable to find such goods.

ACTION OF TORT against the assessors of North Bridgewater and a deputy sheriff of Plymouth County, for an arrest and

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imprisonment of the plaintiff. Trial before *Merrick*, J., who signed this bill of exceptions:

The plaintiff was taxed in that town as a nonresident owner of real estate; and the assessors gave their warrant to the collector of taxes; and he issued his warrant to the deputy sheriff, who, after due demand and nonpayment, and diligent search for goods and chattels of the plaintiff, and for goods upon the premises assessed, arrested the plaintiff and imprisoned him in the county jail.

There was no evidence of any failure of the collector to find sufficient goods upon which the tax might be levied, except the return of the deputy sheriff, which set forth a demand and refusal, and that the officer, "having made diligent search for goods and chattels of the said Snow, and for goods upon the premises assessed, whereon to levy this warrant for the discharge of his said tax or any part thereof," arrested his body, and committed him to jail.

The plaintiff requested the judge to instruct the jury "that for a tax assessed upon real estate the body of the plaintiff could not lawfully be taken, and that the only remedy of the collector in default of payment was to sell the property under the statute; and "that the said return did not show a justification, because it did not show that the officer did not find sufficient goods upon which said tax might be levied." But the judge refused to give these instructions, and ruled the exact contrary of each of these propositions. A verdict was rendered for the defendants, and the plaintiff alleged exceptions.

J. A. Jacobs, for the plaintiff. 1. The only remedy for nonpayment of a tax on real estate is by distress of goods, or sale of the land, notwithstanding the general language of Rev. Sts. *c.* 8, § 11. Constitution of Mass. *c.* 1, § 1, art. 4. Otherwise a mortgagor, tenant at will, tenant by sufferance, heir, assignee in insolvency, or other citizen whose interest in the land is valueless, may be thrown into jail for such tax; and if such interpretation be oppressive in any case, it cannot be the true meaning of the legislature. Rev. Sts. *c.* 7, §§ 7, 18, 19.

2. In this case, at any rate, the arrest was unlawful, because

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there is no evidence of a want of goods whereon to levy, the officer's return being consistent with his finding such goods *Shields* v. *Hastings*, 10 Cush. 247.

M. G. Cobb, for the defendants, cited, to the first point, Rev. Sts. *c.* 8, §§ 7, 11, 13, 18, 19; *Gordon* v. *Clifford*, 8 Foster, 402; *Shaw* v. *Peckett*, 25 Verm. 423; *Allen* v. *Gleason*, 4 Day, 376, and to the second, *Stevens* v. *Kent*, 26 Verm. 503; *Stone* v. *Dana*, 5 Met. 98.

Merrick, J. 1. The plaintiff insists that a tax duly assessed upon land of a nonresident proprietor can be collected only by a seizure and sale of personal property or of the land itself. If this position could be maintained, the further proposition contended for by him, that the defendants acted without legal authority, and were trespassers in causing him to be arrested and imprisoned for the purpose of enforcing the payment of the tax imposed upon his land, would follow as a direct and necessary consequence. But the terms in which the provisions of the statute upon this subject are expressed are too explicit to admit of any doubt in their interpretation; and they so clearly afford a further and additional remedy for the collection of a tax, that the conclusion of the defendants cannot be adopted without a manifest perversion of their meaning. If any person neglects for fourteen days after demand to pay his tax, the collector, if unable to find goods upon which to levy it, may take the body of such person and commit him to prison, there to remain until he shall pay the tax and charges of commitment and imprisonment. Rev. Sts. *c.* 8, § 11. And the like proceeding precisely may be had in the collection of taxes upon land of nonresident proprietors. § 19. If cases may be supposed, such perhaps as some of those referred to by the plaintiff's counsel, in which the application of the imperative rule of the statute in the collection of taxes would seem to be too hard and severe to justify its continuance, relief should be sought in its modification by the legislature and not in its abrogation by judicial construction.

2. The arrest of the defendant could be justified only upon its being made to appear in the return of the officer that he

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could find no goods whereon to levy the tax. This is not indeed said by him in express terms; but taking into consideration the whole of the return, that conclusion appears to be a direct and unavoidable implication from its statements. That is sufficient. It is not suggested by the plaintiff that in fact any goods existed which could, upon search or inquiry, have been found whereon the tax might have been levied; he only relies upon a supposed imperfection, not in the discharge by the officer of his duty, but in the account which he has rendered of its performance; but we see no deficiency which will sustain his objection. *Exceptions overruled.*

NANCY POND *vs.* NATHANIEL JOHNSON.

A demand of dower in land held by two persons in severalty will not support an action against either for dower in his part of the land.

WRIT OF DOWER. Trial before *Merrick*, J., who took a verdict for the demandant, subject to the opinion of the whole court upon the question whether a sufficient demand had been made.

The demand relied on was the service by a deputy sheriff, by authority of the demandant, by delivering to Nathaniel Johnson and Sylvester Phipps a written demand signed by the demandant, and addressed to both of them, to set out and assign dower to her, as widow of Jeremiah Pond, in certain land described by metes and bounds according to a certain deed thereof from Pond, and also as "now bounded as follows, to wit," (being a different description, except on the south,) "on the southerly side by said county road, on the easterly side by land of Adelia M. Lamb, on the northerly side by land of said Johnson and land of one Michael Ward, the westerly boundary being in and through the land of said Phipps, the land of said Phipps being next adjoining the land of said Johnson."

It appeared that the land described in this demand was owned partly by the tenant, and partly by Phipps, in severalty. And

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the tenant objected to the sufficiency of the demand, on that ground, and because it was made by a stranger.

C. R. Train, for the tenant, cited Stearns on Real Actions, 305; *Newton* v. *Cook*, 4 Gray, 46; *Burbank* v. *Day*, 12 Met. 557.

B. F. Butler, for the demandant, cited *Alvord* v. *Collin*, 20 Pick. 418; *Atwood* v. *Atwood*, 22 Pick. 283; *Page* v. *Page*, 6 Cush. 196; *Burbank* v. *Day*, 12 Met. 557; *Baker* v. *Baker*, 4 Greenl. 67.

Dewey, J. The demand of dower in the present case was insufficient, it being a demand upon two persons who owned in severalty the land described, and the demand embracing the entire tract thus owned by the two persons. If such demand thus made on two persons, having distinct interests in distinct parcels, was a good demand, it would be equally so if it had included ten, or even an hundred, adjacent owners of distinct parcels. In such cases, the actions must be distinct and the demands should also be several, requiring of each to assign dower to the widow in land of which he was tenant of the freehold. Stearns on Real Actions, 305. *Fosdick* v. *Goodwin*, 1 Greenl. 30.

The second description of the land does not remove the objection, as it is still a demand upon both for dower in the whole land, and for the further reason that the description is too loose and uncertain as a description of the separate parcels owned by each.

No sufficient demand having been made upon the tenant to assign dower, this action cannot be maintained, and the verdict for the plaintiff must be set aside for that cause. It becomes unnecessary to express any opinion as to the sufficiency of the service of the notice by leaving a copy by an officer.

New trial ordered.

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Aaron French *vs.* Nathan Haskins.

A recorded assignment of "so much of a mortgage and property therein described as will amount to" a certain sum, less than the mortgage debt, passes no legal title against a subsequent purchaser from the mortgagee without actual notice of the assignment.

Action of tort for the conversion of a steam engine, shafting, belts, pullies, wheels and gearing, exceeding two hundred dollars in value. The case was submitted to the decision of the court on the following statement of facts:

In February 1851 John C. Bell, then owner of this property, mortgaged it together with other property to Bradbury C. Bartlett to secure the payment of nine promissory notes. In July 1851 Bartlett, in consideration of $200 paid to Bell with his consent, indorsed to the plaintiff, "without recourse," two of the notes of $100 each, and, with Bell's consent, executed to the plaintiff an assignment of "so much of the within mortgage and property therein described as will amount to the sum of two hundred dollars with interest, as security to said French for the payment of" said two notes, "to have and to hold the same in as ample a manner for the full payment of said sums and interest as I might or could have held the same if this assignment had not been made." The mortgage and assignment were duly recorded, and afterwards remained in the plaintiff's possession.

Bartlett had previously refused to execute an assignment to the plaintiff "of the mortgage deed and the property therein described, and also two of the notes therein mentioned," (describing them,) "to have and to hold the same to him the said French and his heirs, executors, administrators and assigns in as full and ample a manner as I could hold the same"— upon the ground that by so doing he should lose all control of the mortgaged property.

In the autumn of 1852 Bell sold to Bartlett all his interest in the mortgaged property by parol, and gave him absolute control of the property so far as he, Bell, was concerned, without affect-

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ing the claim of Bartlett upon Bell for the amount due him beyond the value of the property; and Bartlett took possession of the property mentioned in the writ, and sold it to the defendant, and received the price thereof; neither Bartlett nor the plaintiff having ever taken any further steps to foreclose the mortgage.

The plaintiff afterwards demanded this property of the defendant, who previously had no actual notice of the existence of the assignment to the plaintiff.

M. G. Cobb, for the plaintiff, cited *Hills* v. *Eliot*, 12 Mass. 26; *Langdon* v. *Keith*, 9 Verm. 299; *Wright* v. *Parker*, 2 Aik. 212; *State Bank* v. *Tweedy*, 8 Blackf. 449.

B. Dean, for the defendant.

Shaw, C. J. The assignment of Bartlett was in terms the transfer of a part of a quantity of goods, in no way designated or identified, except by the mortgage from Bell to Bartlett. It was in terms a transfer of part without separation, and accompanied by no act of separation or delivery in fact. As a sale, conditional or absolute, it was void to pass the property, in any part, and vest it in the assignee. Bartlett had expressly refused to assign the entire property, by which, perhaps, it would have been sufficiently described and identified, and had refused so to assign, because he did not intend to part with his own possession and control of the mortgaged property. This partial assignment may possibly be construed to be of the nature of a declaration of trust on the part of Bartlett, binding him in equity to account with the plaintiff, out of the proceeds of the sale of these goods, either for the whole $200, or for such proportion thereof as the two notes of the plaintiff bore to the whole of the notes secured by it. But it did not make French tenant in common with himself. The legal title still remained in Bartlett, so that his sale to the defendant was good. The plaintiff's action being in the nature of tort, founded solely on the ground that the plaintiff acquired a specific right of property in the goods, and that title having failed, this action cannot be maintained. *Judgment for the defendant.*

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COLBURN BLOOD, Administrator, *vs.* ABRAM FRENCH.

An administrator is a competent witness under *St.* 1856, *c.* 188, in an action on a contract made by himself as such.

An auctioneer has no authority to bind an administrator personally by a warranty of the condition of goods of the intestate.

ACTION OF CONTRACT to recover the price of a quantity of hay sold by public auction by the plaintiff as administrator of the estate of Nathaniel B. Coburn to the defendant. Answer, "that the hay was sold by sample for well cured, sweet, English hay, and represented to be as good as the sample exhibited; and that the hay was sour and musty, and of little or no value." Trial in the court of common pleas before *Aiken*, J., who signed a bill of exceptions, the material part of which was as follows:

"Both parties offered themselves as witnesses and were admitted by the court. To the admission of the plaintiff the defendant excepted.

"There was evidence tending to show that the hay at the time of the sale was in a barn, mostly surrounded by other hay, and not easily accessible; that, after the hay was offered and the bidding commenced, some person said he wanted to see the hay, and the sale was suspended, and a purchaser at the sale and bidder on this hay, on his own motion, went up, and brought down some of the hay, which the defendant and the auctioneer examined, and the auctioneer said was 'as sweet as a nut,' and the auctioneer also said the hay was all alike; and the sale was then resumed.

"The auctioneer, who was called as a witness by the defendant, testified that he had no authority to warrant the hay, and that he made no warranty; and there was conflicting evidence as to what was said by the auctioneer at the sale. It appeared that the plaintiff was present and kept the account of the sales; but it did not appear that he had any knowledge of the hay, or authorized any sale of it by sample, or made any representation or warranty about it.

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"There was evidence tending to show that after the hay was delivered it was musty and sour, and the defendant's horses would not eat it.

"The court instructed the jury that, unless they were satisfied that the plaintiff warranted the hay, or authorized the auctioneer to warrant it, they must find for the plaintiff; and that if the hay was sold by a sample, it would amount to a warranty that the bulk was as good as the sample, if the parties so understood and intended it as a sale by sample.

"The defendant requested the court to instruct the jury 'that the auctioneer, being the agent of the plaintiff, if they were satisfied that he made any warranty in the presence of the plaintiff, he was bound by it; that if the auctioneer sold and the defendant purchased the hay by a sample, it was a warranty, and the plaintiff was bound by the sale and representation as made by the auctioneer; and that if the auctioneer made any representation in relation to the quality or kind of hay by word or deed, the plaintiff was bound by it.' And the court so instructed the jury, adding however the qualification 'if the plaintiff had knowledge of it.' To this qualification the defendant excepted. The jury returned a verdict for the plaintiff."

A. R. Brown, for the defendant, cited *Morton* v. *Dean*, 13 Met. 385; Chit. Con. (8th Amer. ed.) 354; Story on Sales, § 351.

A. P. Bonney, for the plaintiff.

Bigelow, J. 1. The parties to the suit were competent witnesses. The exception in *St.* 1856, *c.* 188, is intended to apply only to cases where the suit is brought by or against an executor or administrator, on a contract or cause of action made or existing before the death of the party represented on the record, and not to a case like the present, where the action is brought on a contract made with an administrator personally concerning the sale of the effects in his hands.

2. The instructions as to the right and authority of the auctioneer to warrant the article sold were correct. We doubt whether, in an ordinary sale of goods by auction, an auctioneer *virtute officii* has any right or authority to warrant goods sold

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by him, in the absence of any express authority from his principal to do so, and without proof of some known and established usage of trade, from which an authority can be implied. *The Monte Allegre*, 9 Wheat. 647. *Upton* v. *Suffolk County Mills*, 11 Cush. 589. However this may be, we are clear that he has no such authority in a case like this, where he acts as agent for an administrator in selling the goods of his intestate. The nature of the sale and the representative capacity in which the vendor acts in employing the auctioneer, preclude any implied right or authority in the latter to make a warranty, binding on the administrator personally, of the soundness of the articles sold. *Exceptions overruled.*

TIMOTHY PEARSON *vs.* WILLIAM STODDARD & another.

A promissory note payable "four months after, for value received," is payable four months after date.

In an action on a promissory note payable to S. or order, signed on the back by S., and, below that, by W., with "waiving demand and notice" written over the name of each, oral evidence is admissible to show that W. signed the note before its delivery to S., and is therefore liable as an original promisor; and the admission of evidence that S. refused to take the note, unless the maker "would get another name to be responsible to him on it," is immaterial and no ground of exception.

ACTION OF CONTRACT, commenced on the 14th of October 1856, against Stoddard, Scott (who was defaulted) and Whithead, on the following promissory note:

"$100. Lowell, June 2d 1856.

"Four months after for value received I promise to pay E. W. Scott or his order the sum of one hundred dollars with interest.

"William Stoddard."

On the back of the note was written "waiving demand and notice. E. W. Scott." And under that, "Waiving demand and notice. Darius Whithead."

At the trial in the court of common pleas, the plaintiff intro-

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duced evidence of the genuineness of the signatures, and for the purpose of proving that Whithead was not an indorser, but an original promisor, called Scott as a witness, who testified "that he wrote the note; that it was for a debt which Stoddard owed him; that he told Stoddard he would not take it unless he would get another name to be responsible to him on it; that after Stoddard signed said note, and before he delivered it to Scott, he took it to Whithead, and Whithead put his name on the back of it, writing over his name the words 'waiving demand and notice;' that Stoddard afterwards delivered it in that condition to Scott, in payment of the debt which he owed him; that Scott afterwards put his own name on the back of the note above Whithead's signature, writing above his own name 'waiving demand and notice;' that he then negotiated the note for value to Pearson; Scott and Pearson (as Scott testified on cross-examination) having made a previous arrangement that if Scott would get such a note, Pearson would take it and let him have the money on it."

The defendants objected to the introduction of this testimony to contradict or vary the terms of the note. But *Mellen*, C. J. admitted it for the purposes for which it was offered; and ruled that the testimony of Scott, if true, made Whithead an original promisor and not an indorser; and also ruled that the note was due and payable, by its terms, in the absence of any testimony on that point, at the time of the instituting of the suit. Scott was defaulted. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

A. F. L. Norris, for the defendants, upon the point of the time of payment of the note, cited Story on Notes, §§ 27, 28, 29; upon the competency of Scott's testimony, 1 Greenl. Ev. § 275; and upon its effect, *Pierce* v. *Mann*, 17 Pick. 244.

D. S. Richardson, for the plaintiff, cited to the first point *Henry* v. *Jones*, 8 Mass. 455; *Phipps* v. *Tanner*, 5 Car. & P. 488; and to the others, *Union Bank* v. *Willis*, 8 Met. 504; *Bryant* v. *Eastman*, 7 Cush. 111; *Riley* v. *Gerrish*, 9 Cush. 104.

Dewey, J. 1. It is objected that by the terms of the note the same was not due and payable at the time when the suit was

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instituted. This objection arises wholly from the use of the words "four months after," and it is contended that this cannot be read "four months after date," but is quite as properly read "four months after sight," or "four months after request," and so being uncertain, no legal liability exists to pay the note in four months after date. We think this objection cannot avail, and that the proper reading of the note is "four months after date," the omission of the last word being properly supplied, and the most obvious and natural reading being in that form.

2. The testimony of Scott was properly admitted to the extent of showing the time when the name of the defendant was written upon the note, and whether it was before or after it was indorsed by the payee. To this extent such evidence is competent, and is not in violation of the rule excluding oral evidence when offered to control a written contract. Under our numerous decisions, which are collected and stated in the case of *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Met. 504, as well as by various subsequent decisions, a signature on the back of a negotiable note by a third person in blank, before the same has been put in circulation, or delivered to the payee, and before any indorsement of the note by the payee, creates the relation and liability of a maker of the note.

The nature of the contract and the character of the liability of the defendant depended therefore upon the fact of the time when he placed his name upon the note; and this is to distinguish his liability, whether it be that of maker, guarantor or indorser. The additional facts stated by the witness, beyond that of the time of the signature, were immaterial, and, although not strictly admissible, furnish no ground for setting aside the verdict.

The words "waiving demand and notice," written above the name of the defendant, although certainly more appropriate words to accompany an indorsement of a note by a regular indorser, yet do not change the relation of the defendant, or his liability to be charged as maker, if in fact, when he signed the note, the same had not been negotiated by the payee and in-

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dorsed by him. The evidence shows that this was the fact, and of course controls any inference which might otherwise be drawn from the use of the words recited.

Exceptions overruled.

CHARLES R. NICHOLS *vs.* HENRY F. HOLT.

The indorsee of a promissory note, upon receiving a partial payment from the maker, agreed not to sue him for the balance, and subsequently transferred the note to H. H. sued the indorser for the balance, and attached his real estate; and he pending the suit conveyed said estate to W., taking back an agreement to save him harmless from the suit. H. recovered judgment for the balance of the note and levied on the estate; and transferred the judgment and the estate levied on to B., who agreed with the maker to obtain for him a discharge of all liability upon the note. *Held*, that the indorser could recover of the maker the amount which he had been obliged to pay; and that evidence of the nature and consideration of the conveyance by him to W. and that W. had no knowledge of the attachment was immaterial, and its exclusion no ground of exception.

ACTION OF CONTRACT against the maker of a promissory note for $689.50, dated February 21st 1848, and payable to the plaintiff. Answer, no interest in the plaintiff; and payment.

At the trial in the court of common pleas at December term 1856 before *Perkins*, J., the defendant introduced evidence of these facts: The plaintiff indorsed the note for valuable consideration to J. W. Blodgett & Company, who, on the 1st of December 1848, upon receiving $369 from the defendant, signed an agreement "not to sue or molest him by reason of said note, nor at any time hereafter call upon him for the payment of said note," and "not to call on Charles R. Nichols as indorser of the note for the space of nine months from the date of" that agreement. Blodgett & Company subsequently transferred the note to Ephraim Hutchins, who after the expiration of nine months sued the plaintiff as indorser, attached his real estate, recovered judgment against him for the balance due upon the note, and satisfied it by a levy of execution upon the real estate. After the attachment and pending the suit, the plaintiff conveyed his real and personal property to Daniel West, taking back an ob-

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ligation to defend the action brought by Hutchins, and to save the plaintiff harmless from that action, and from any judgment thereon. Hutchins, with the assent of the plaintiff and defendant, assigned the judgment recovered by him against the plaintiff to Daniel Bradt, and gave him a quitclaim deed of the property levied upon; and Bradt agreed to procure for the defendant a full discharge from all liability upon the note in suit.

The defendant offered to prove by West that, when he took the deed of the land attached, nothing was said about the attachment, and that he did not think of it; the actual consideration of that conveyance; that West defended Hutchins's suit at his own expense; that previously to that conveyance he had become liable for the plaintiff to the amount of $8000; and that all the property so conveyed did not exceed $4000 in value. But all this evidence was excluded as immaterial.

The judge instructed the jury that if the plaintiff, at the commencement of this suit, held the interest in the note, which he appeared from the evidence introduced to have held, and if there had been no other payments than those proved, he was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

R. B. Caverly, for the defendant.

B. F. Butler, for the plaintiff.

Metcalf, J. The court cannot see, in the evidence given by the defendant, any legal defence to this action. The defendant has paid only $369 on the note; the plaintiff, as indorser, has paid the balance by satisfying a judgment therefor in a suit against which he had no legal defence; and he is now entitled to recover that balance from the defendant in this action. Such is the effect of the transaction between Blodgett & Company and the defendant, and the recovery by Hutchins against the plaintiff. *Sohier* v. *Loring*, 6 Cush. 537. *Hutchins* v. *Nichols*, 10 Cush. 299. And this claim on the defendant is in no way impaired or affected by the transactions between the plaintiff and West, or by the transactions between the defendant and Bradt.

The plaintiff has the note in his possession; and under the

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instructions given to the jury it must now be taken as a fact that he held the interest in it when he commenced this action. And we need not inquire whether he pursues this action for his own benefit, or for the benefit of West, to whom he conveyed the real estate which Hutchins had attached and which was levied upon in satisfaction of Hutchins's judgment.

The exceptions to the exclusion of certain testimony offered by the defendant at the trial have not been much insisted on in argument, and cannot be sustained. That testimony was not material to the issue. *Exceptions overruled.*

JOSHUA BENNETT *vs.* PATRICK RYAN.

In an action on a promissory note given in consideration of a warranty deed of land, the defendant cannot introduce parol evidence that other land was previously agreed to be conveyed to him, not covered by the description in the deed, and from which he was afterwards evicted.

ACTION OF CONTRACT on a promissory note. Answer, failure of consideration.

At the trial in the court of common pleas, it appeared that the note had been given as part of the consideration of a deed from the plaintiff to the defendant, of land "with the buildings thereon," with full covenants of warranty.

The defendant then offered to show that he bargained with the plaintiff for the buildings and the land under them, as shown on a certain plan, and had taken the deed on the representation that they were included within the boundaries in the deed; but that afterwards he found that the buildings were set partly upon the land of a third person, who evicted him and compelled him to remove the buildings at an expense greater than the amount sued for.

Bishop, J. ruled that the evidence did not support the defence, and directed a verdict for the plaintiff. The defendant alleged exceptions.

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B. F. Butler, for the defendant. The evidence which was offered tended to show that the parties bargained for certain buildings and the land under them, and that the plaintiff falsely represented that the same were conveyed by the deed in consideration for which this note was given. This was a fraud, as the plaintiff was bound to make true representations, if any. *Hazard* v. *Irwin*, 18 Pick. 108. The note in suit was not given for the land described in the deed, but for the buildings and land pointed out and bargained for. The evidence offered tended to prove a total failure of consideration, and should therefore have been admitted. *Wearse* v. *Peirce*, 24 Pick. 145. *Daggett* v. *Daggett*, 8 Cush. 520. Otherwise, the defendant has no remedy; for the covenants in the deed extend only to the land described in it. The questions of fraudulent intent and failure of consideration should not have been withdrawn from the jury. *Prescott* v. *Wright*, 4 Gray, 461.

A. R. Brown, for the plaintiff.

Shaw, C. J. The note in suit was given in consideration for the deed actually given and accepted by the grantee. The attempt now is to show by parol evidence that the agreement was to convey more land than the deed conveyed, which is repugnant to the deed, and inadmissible. If there was a fraudulent misrepresentation, that his land was more than it really was and embraced the whole surface on which a certain building stood, which representation was wilfully false, and the defendant acted upon it to his damage, a separate action will lie. *Brown* v. *Castles*, 11 Cush. 349, and cases there cited.

Exceptions overruled.

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JOHN A. WHITNEY *vs.* ALFRED BACON.

Declarations as to boundaries, made by one, now deceased, who had previously occupied, but never owned, the land, and who had ceased to occupy it at the time of the declarations, are inadmissible against a subsequent owner.

ACTION OF TORT for breaking and entering the plaintiff's close. At the trial in the court of common pleas, the plaintiff, as part of his testimony to prove the true boundary line of the close, called a witness, whom *Sanger*, J., against the defendant's objection, permitted to testify that Samuel Perry, now deceased, who had previously occupied, but never owned, the land adjoining the plaintiff's close on the line in question for about twenty five years, went with the witness, many years after he had ceased to occupy it, to the disputed line, and pointed out a ditch and certain heaps of stones as the true boundary of the plaintiff's close. The verdict was for the plaintiff, and the defendant alleged exceptions.

J. W. Bacon, for the defendant, cited *Daniel* v. *North*, 11 East, 372; *Wood* v. *Veal*, 5 B. & Ald. 454; *Tickle* v. *Brown*, 4 Ad. & El. 369; *Papendick* v. *Bridgewater*, 5 El. & Bl. 176; 1 Greenl. Ev. § 145; *Abington* v. *North Bridgewater*, 23 Pick. 170; *Daggett* v. *Shaw*, 5 Met. 223; *Bartlett* v. *Emerson*, 7 Gray, 174.

B. F. Ham, for the plaintiff, cited *Boardman* v. *Reed*, 6 Pet. 341; *Van Deusen* v. *Turner*, 12 Pick. 532; *Lund* v. *Tyngsborough*, 9 Cush. 36; *Adams* v. *Stanyan*, 4 Foster, 405; 1 Cowen & Hill's Notes to Phil. Ev. (3d ed.) 244–251; *Daggett* v. *Shaw*, 5 Met. 223; *Marcy* v. *Stone*, 8 Cush. 4.

BIGELOW, J. The general rule is that hearsay evidence is inadmissible. To render it competent in cases of boundary, it must fall within the exception to the rule laid down in *Daggett* v. *Shaw*, 5 Met. 228. *Flagg* v. *Mason*, 8 Gray, 557, & cases cited. In the present case, the person, whose declarations concerning the boundary of the close in question were admitted, was not in possession of the land when he made the statements which were offered in evidence. They do not therefore come within the exception, and were erroneously admitted.

Exceptions sustained.

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ABNER PHELPS *vs.* ASA P. MORSE.

In an action of tort for forcibly entering the plaintiff's close and taking up and converting two posts, the taking and conversion of the posts is matter of aggravation, and disproving it does not defeat the action.

ACTION OF TORT, commenced before a justice of the peace. The declaration alleged that "the defendant forcibly entered the plaintiff's close," (described,) "and took and carried away two cedar posts erected and set up for the purposes of designating the boundaries of said close, and converted them to his own use." The defendant by an oral plea denied the plaintiff's right to maintain the action.

At the trial in the court of common pleas before *Perkins*, J., there was evidence that the defendant and his servant entered the plaintiff's close and removed a fence, of which the cedar posts were not part; and that his servant removed said posts; but there was conflicting evidence upon the question whether these posts were removed in the presence of the defendant or by his direction. The defendant requested the judge to instruct the jury, that unless they were, the action could not be maintained. But the judge refused; and instructed the jury that "if they found that the defendant had committed the trespass on the plaintiff's land as charged in the declaration, they might find him guilty, though they might not be satisfied that he took up and converted the cedar posts, but in this latter case they would find only nominal damages." The jury returned a verdict for the plaintiff for nominal damages, and the defendant alleged exceptions.

J. A. Jacobs, for the defendant.

C. R. Train, for the plaintiff.

BY THE COURT. The allegation of the removal of the posts was merely by way of aggravation, and disproving that did not defeat the action. *Eames* v. *Prentice*, 8 Cush. 337. *Knapp* v. *Slocomb*, *ante*, 75. *Exceptions overruled.*

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Silas Sanborn *vs.* William W. Dennis.

The provision of *St.* 1853, *c.* 316, that a suit in equity for the redemption of a mortgage, commenced by bill inserted in a writ, shall not be deemed to be commenced until service of the writ, is not affected by *Sts.* 1855, *c.* 194, and 1856, *c.* 88, defining the general equity jurisdiction of this court in cases of fraud, mortgages, accident and mistake.

The neglect of a mortgagee in possession to render to the mortgagor on demand an account of the amount due on the mortgage is no reason for extending the time of redemption.

Bill in equity, inserted in a writ, dated February 5th 1856, and served on the defendant on the 8th of said February, and duly entered on the return day, for the redemption of land in Cambridge from a mortgage, under which the mortgagee had entered for foreclosure on the 8th of February 1853, and continued in possession till the assignment of his interest to the defendant, who had continued in possession ever since.

The defendant contended that the suit was brought too late, because no copy of the writ and of the description of the land had been deposited in the clerk's office within three days after the service, as required by *St.* 1853, *c.* 316. The plaintiff admitted that no such copy had been filed; but insisted that that statute had been repealed by *Sts.* 1855, *c.* 194, and 1856, *c.* 38, which declare that this court "shall have jurisdiction in equity in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages," and "of accident or mistake," "where the party asking relief has not a plain, adequate and complete remedy at common law, with the powers belonging to said court in suits in equity;" but neither of which contains any provisions as to service, or as to what shall be deemed the commencement of a suit.

The defendant admitted that within three years after the entry to foreclose, the plaintiff had requested him to render an account of the amount due under the mortgage, and that he had not complied with the request. The plaintiff contended that this neglect of the defendant to render an account had unfairly prevented him from redeeming, and that the time allowed him for redemption ought to be extended.

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But *Merrick*, J. ruled that the plaintiff could not support his bill on either ground, and reported the case to the full court.

G. E. Betton, for the complainant.

J. A. Jacobs, for the defendant.

By the Court. The provision of *St.* 1853, *c.* 318, is explicit, that when a bill in equity for the redemption of a mortgage of real estate is inserted in a writ, the depositing of the writ or a copy thereof in the clerk's office shall be deemed the commencement of the suit, unless it is so deposited within three days after service, and in that case the service shall be deemed the commencement of the suit.

As it is admitted in this case, that the service was made on the last day of the three years, and no copy of the writ was deposited in the clerk's office within three days after that, the suit was commenced too late.

The *Sts.* of 1855, *c.* 194, and 1856, *c.* 38, defining the general equity jurisdiction of this court, do not affect this specific provision of the *St.* of 1853, *c.* 316. They are not upon the same subject matter.

There is no evidence of any fraud, mistake or accident, to require the interposition of a court of equity.

Judgment for the defendant.

Abel Parker *vs.* Joseph Rugg.

A judgment rendered twenty years ago, and recently made up by permission of the court, may be allowed to be set off in an action commenced many years after that judgment and before the completion of the record.

Action of contract, commenced at September term 1835 of the court of common pleas, on a judgment recovered by Parker against Rugg at December term 1835 of that court for damages and costs.

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At that same term judgment was rendered against Parker by default in an action brought against him by Rugg on two promissory notes; but, by reason of Rugg's omission to furnish the clerk with the necessary papers, the record of that judgment was not completed until December term 1855, when the court of common pleas, upon a petition presented at September term next preceding, ordered it to be completed. To that order Parker alleged exceptions, which were overruled by this court at October term 1856, (7 Gray, 172,) and the case remitted to the court of common pleas, where the record of that judgment was then made up pursuant to its order. On the day of the passage of that order, in December 1855, that court had allowed Rugg, against Parker's objection, to file a declaration in set-off in this action, founded on that judgment. No part of either judgment has ever been paid. The parties submitted to the decision of the court of common pleas, and, by appeal, to this court, the question whether upon these facts the judgment against Parker could be filed in set-off.

S. A. Brown, for the plaintiff. No demand can be filed in set-off, which is not a subsisting debt due at the time of the commencement of the action. Rev. Sts. *c.* 96, § 4. *Varney* v. *Brewster*, 14 N. H. 49. *Carpenter* v. *Butterfield*, 3 Johns. Cas. 145. *Jefferson County Bank* v. *Chapman*, 19 Johns. 322. The right of set-off rests only on statutes, and is not to be extended beyond their words. At the time of the commencement of this action, the defendant had no claim on which he could have brought a suit; and whether he ever would have any depended upon the discretion of the court.

If the defendant can be allowed to file his judgment in set-off, it must be upon the ground that after the order for the completion of the record the judgment is to be considered as in all respects of the term at which it was originally rendered. And thus the party who obtained it might file it in set-off, and yet the adverse party, if six years elapsed before the completion of the record, have no opportunity to sue out a writ of error. Rev Sts. *c.* 112, § 19.

E. A. Kelly, for the defendant.

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Bigelow, J. The court of common pleas, in ordering the record of the judgment of Rugg against Parker to be made up, rendered no new judgment, but only perfected the evidence of the judgment rendered at December term 1836. That judgment was therefore in existence at the time of the commencement of this action, and so a proper matter of set-off.

Exceptions overruled

Isaac W. Bangs & another *vs.* Shepherd Watson.

A judgment on a debt for necessaries is barred by a certificate of discharge under subsequent proceedings in insolvency, although the original debt would not be barred.

Dewey, J. This is an action upon a judgment, in defence of which the defendant sets up a discharge under our insolvent laws. The plaintiff, admitting the legality of the proceedings in insolvency, and that the usual discharge was granted to the defendant, yet denies that it constitutes any defence to the present action, inasmuch as by the provisions of *St.* 1848, *c.* 304, § 10, it is provided that no discharge of a debtor under the insolvent acts, "shall bar any claim for necessaries furnished to such debtor, or to his family, unless such claim shall have been proved against his estate." The question is, whether the present claim falls within the provisions of this section.

This suit is brought upon a judgment recovered in the court of common pleas in December 1850. That judgment was not proved against the estate of the insolvent, and the plaintiff now offers to show that the demand upon which it was recovered was for necessaries furnished by the plaintiff to the defendant It is contended on the part of the defendant that the original indebtedness, or cause of action in the suit in which judgment was rendered in 1850, was merged in the judgment, and that the only existing debt that could have been proved in insolvency was a debt for money due on a judgment.

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How far a judgment is to be considered as a merger of the original cause of action, and how far on the other hand the court will look into the judgment for the purpose of ascertaining what the original cause of action was, seems to be a point upon which even our own authorities are not entirely uniform.

In *Betts* v. *Bagly*, 12 Pick. 572, where an action was brought upon a judgment rendered in Massachusetts, between parties resident in New York, and where the original cause of action was a debt created in New York and subject to the insolvent law of New York, the court did look behind the judgment, and give effect to the discharge. Unless a distinction can be taken from the fact that the debt was contracted in New York, and the parties always had resided in New York, as well at the time of the creation of the debt as at the time of instituting a suit and obtaining a judgment in Massachusetts, the decision in the case of *Betts* v. *Bagly* seems at variance with the more recent cases decided by this court as to the effect of a judgment in merging the original cause of action.

In *Sampson* v. *Clark*, 2 Cush. 173, where a judgment was recovered three days after the first publication of notice that a warrant had issued against the estate of the debtor, the court held that the original demand could not be proved, because it was extinguished by the judgment; and the judgment debt could not be proved, because the same was not rendered until after the publication of notice of the issuing of the warrant. In *Rindge* v. *Breck*, 10 Cush. 43, where a promissory note was sued, and a discharge under the insolvent laws pleaded in defence, the court refused to allow the plaintiff to show that the consideration of the note was a debt due for necessaries furnished by the plaintiff to the defendant, and that the note was given in settlement of the book account therefor. It was said in that case by the court that "the plaintiff's claim was on a promissory note, and not on an account for necessaries. By taking the note, the party obtained the advantage of conclusive proof of his debt, and the power of negotiating it; by retaining his original demand, he would have had the advantage of prov-

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ing his debt, or of retaining his cause of action against the debtor, in case of insolvency. But he could not retain both, and by electing one he relinquished the other."

It seems to us that the case is still stronger here, as a judgment must be held to operate more fully as a merger of the original cause of action than the taking of a negotiable note, payable on demand. As a matter of evidence the judgment is far more conclusive. It has also the benefit of exemption from the general statute of limitations, thus rendering it more available than an account. It would not be open to the defendant to inquire into the consideration, and the plaintiff may also properly be estopped from a similar inquiry for the purpose of rendering his judgment more effectual.

The decision in the case of *Sampson* v. *Clark*, which has also been followed by others, certainly establishes the doctrine that a judgment is a merger of the original cause of action, so far as to defeat any claim for an allowance under it, against an insolvent estate. See *Faxon* v. *Baxter*, 11 Cush. 37, and cases cited. If this be so, such judgment must also defeat any claim to recur to the original cause of action to avoid a discharge which would be good against any judgment rendered, as this was, before the institution of the proceedings in insolvency.

Exceptions overruled.

A. F. L. Norris, for the plaintiff.

A. R. Brown, for the defendant.

MARTHA G. RICHARDSON *vs.* CALEB RICHARDSON.

The lessee of part of a house, with a right "to have the improvement of all the homestead land," cannot grant a license to a stranger to pass for his own purposes over the land, against the will of the lessor.

ACTION OF TORT for breaking and entering the plaintiff's close. The facts, as shown by the report of an arbitrator, to whom the case was referred, are stated in the opinion.

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MERRICK, J. The defendant attempts to justify the acts complained of under a license from Dustin, the plaintiff's lessee. It is found by the arbitrator that the plaintiff is the owner in fee of the premises described in the declaration; and that the particular close, on which the alleged trespass was committed, consists of a small strip of land inclosed on each side by fences, and by a gate and bars at the end of it, and is appropriated to, and used exclusively for, the purpose of a private street or passage way from the public highway to the dwelling-house and lands in the occupation and improvement respectively of herself and her tenant Dustin under his lease. The latter, so far as he had any legal right to do so, against the will and objection of his lessor, gave permission to the defendant to pass through and over this passage way to his own land, and to use it for that purpose at his pleasure. In the opinion of the arbitrator, Dustin had no right under his lease to give such license or grant such a privilege. But this question is expressly reserved and referred to the consideration of the court; and in the alternative award reported, the judgment now to be entered is made dependent upon the determination of it.

By the provisions of the lease to Dustin, the plaintiff demised to him for a term of years a certain described part of her dwelling-house and other buildings standing on the close described in the declaration, and also gave to him the right "to have the improvement of all the homestead land" which came to her by virtue of the last will of her deceased husband. As the private passage way before mentioned, from the public highway to the dwelling-house, constituted a part of the homestead farm, the lessee was entitled to have the improvement of it. But how, in what manner, and to what extent, was he to have the use and enjoyment of it? The answer is plain, that he was to use it, according to what it is obvious must have been the understanding of the parties to the contract, for the only purpose for which, in connection with the occupation of the whole estate, it was prepared, set apart and exclusively appropriated. He has an unrestricted right of way there, to whatever extent it should be found needful in the conduct of his business and the

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complete enjoyment of the leasehold premises; and this includes, of course, an authority to grant a license for the use of it, in common with himself, to all persons whom he employs or supports on the premises, or who have any lawful occasion to resort to the place or to hold communication with any persons resident there. But this is the limit of his right, and he cannot enlarge it, nor confer upon others any of the privileges which the lease secures only to him; nor enlarge a private way, set apart and appropriated by the plaintiff exclusively to the convenient occupation and improvement of her own estate, into a thoroughfare for strangers or adjoining proprietors. Such a grant to the tenant in no degree tended to dispossess the plaintiff of the close in question. It left it in her possession as before, subject only to the easement of a right of way created by the lease in behalf of the lessee; with this exception it remained wholly her own. The license therefore, which was given by Dustin to the defendant, to use that land for the purpose of passing across it to lands of his own, was unauthorized, and as against the rights of the plaintiff entirely ineffectual. And consequently his entry upon it against her will, and in opposition to her express prohibition, was an act of trespass, for which he is responsible to her. The conclusion upon the whole matter is, that the opinion expressed by the arbitrator is correct, and judgment is to be entered according to his award for the plaintiff.

J. Q. A. Griffin, for the plaintiff

A. V. Lynde, for the defendant.

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DANIEL G. PERRY *vs.* SAMUEL W. RICHARDSON.

Replevin does not lie for property attached on a writ served upon the plaintiff, although he is misdescribed therein and has pleaded in abatement thereof; and cannot be supported by evidence that he did not make the contract therein declared on.

REPLEVIN of a horse. At the trial in the court of common pleas before *Perkins*, J., it appeared that the defendant as deputy sheriff attached the horse on a writ sued out against Daniel Perry, Jr., J. P. Knights and Daniel Perry, and served upon the plaintiff by the name of Daniel Perry of Cambridge, and upon the other defendants therein named; and that to that writ the plaintiff had pleaded in abatement that he was a resident of Stoneham, and the other defendants had answered on the merits.

Upon these facts the defendants contended that this action could not be maintained, because the horse was held under attachment in an action to which the present plaintiff was a defendant; and the court so ruled.

The court had previously rejected evidence, offered by the plaintiff, that the cause of that action was a promissory note signed "D. Perry, Jr., J. P. Knights, Daniel Perry," and that the first and third names were written by Daniel Perry, the plaintiff's son, and were both the names of the same person.

A verdict was returned for the defendant, and the plaintiff alleged exceptions.

A. V. Lynde, for the plaintiff.

C. R. Train, for the defendant.

BIGELOW, J. The property replevied was attached on mesne process against the plaintiff in this suit, and that process was served upon him, and was still pending when this replevin was brought. The Rev. Sts. *c.* 113, § 27, expressly confines the right to maintain replevin for goods attached on mesne process, or taken on execution, to "any person other than the defendant in the suit in which they are so taken or attached." This action therefore was prematurely commenced.

Exceptions overruled.

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Nahum Cole *vs.* Olin Raymond & others.

An heir and residuary devisee, who has given bond as such devisee to pay the debts of his testator, is estopped to set up a subsequent title as heir of the testator's wife, against a warranty deed made by the testator of her land, although all right of action upon the covenants in that deed is barred by the statute of limitations.

Shaw, C. J. Cases growing out of this same transaction have been several times before this court, and the facts are numerous and somewhat complicated. *Raymond* v. *Holden*, 2 Cush. 264. *Holden* v. *Fletcher*, 6 Cush. 235. But the question of law presented in this case is quite distinct from either one before decided.

This is a petition for partition by Cole, claiming one eighth of the estate in fee, and raises therefore a question of legal title. This he claims under a deed from Benjamin Fletcher to him, made and delivered since the death of Joseph Fletcher, father of Benjamin. This changes it to the question whether Benjamin Fletcher had any title which he could then convey. His deed purported to convey all the title which accrued to him as heir of his mother. As heir of his mother, he undoubtedly would have taken an eighth, which would have remained in him, to pass by this deed, if it had not in the mean time been altered and changed by acts done, so that he had ceased to stand merely as heir of the share inherited from his mother; and this raises the real question in the present case upon the facts agreed.

It then appears that the estate sought to be divided was formerly the estate of Simon Tuttle in fee; that at the time of the settlement and distribution of his estate Lucy Fletcher was one of his daughters, and to her were assigned these shares, for reasons stated. She was then the wife of Joseph Fletcher, father of Benjamin; and thereupon, on the assignment of these shares to her, he became inchoate tenant by the curtesy, and as such became seised of the estate for his life only. But for some cause, not explained, the said Joseph Fletcher, by two several deeds, did convey the estate in fee, with full covenants of war-

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ranty, to various persons, under whom the respondents claim title; and it seems clear, that if that deed of Joseph Fletcher could operate and enure to the grantees and respondents as an estate in fee, then the petitioner has no title. But it is contended, that as Joseph Fletcher had a life estate only, his conveyance was inoperative to carry any larger interest; and that in the reversion, expectant on the termination of that life estate, which was in the mother and her heirs, Benjamin, to the extent of one eighth, took the interest as heir of his mother, and thus that eighth passed to the petitioner by his deed.

It is a well established rule of law, that although a deed, as a present conveyance, transfers only the title which the grantor then has, yet if it is a deed in fee, with warranty, it has a further operation as a covenant real running with the land, by which the grantor and his heirs are bound to make it good, so that if the grantor has no good and sufficient title to the estate, yet if he or they afterwards acquire a good title, it forthwith enures to the benefit of the grantee, to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel, if the action be brought in such form that it may be pleaded by way of estoppel; otherwise, by way of rebuttal to the claim of any one bound by such warranty. *Bates* v. *Norcross*, 17 Pick. 14.

Now it appears in the present case, that Joseph Fletcher's father, being thus bound by his covenant of warranty, made a will, by which he made his son Benj min, already an heir, residuary devisee and sole executor, and thereupon Benjamin, as he by law might do, gave bond to pay all his father's debts and legacies, and thereby expressly took upon himself the obligation of such warranty, if indeed he would not have been equally bound as heir. In the mean time Benjamin had acquired a good title in fee, by inheritance from his mother, which good title, according to the rule above mentioned, had, by force of the warranty, enured to the benefit of his father's grantees, by way of estoppel or rebuttal, and of course did not remain in himself.

It is no answer to this, that an action has been brought on

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the covenant of warranty and held to be barred by the statute of limitations. *Holden* v. *Fletcher*, 6 Cush. 235. A covenant of warranty in a deed of conveyance of land, whilst it is a covenant real, and runs with the land, and binds the grantor and his heirs by its force as a covenant real, is also a personal covenant; and if a breach occurs in the lifetime of the warrantor, an action will lie against him to recover damages; or if a breach occurs before the final settlement of the estate, an action will lie against his personal representatives. When the covenant is thus treated as a personal contract, and sought to be enforced as such by personal action, it must be treated in all respects as a personal obligation; the usual incidents to the conduct of a personal action will be applied. But this will not affect the covenant real in its broader application. The result is that no estate passed by the deed of Benjamin Fletcher to the petitioner, and that this petition cannot be maintained.

Petition dismissed.

B. F. Butler & B. Russell, for the petitioner, cited *Somes* v. *Skinner*, 3 Pick. 52; *Doe* v. *Oliver*, 10 B. & C. 186; *White* v. *Patten*, 24 Pick. 324; *Allen* v. *Sayward*, 5 Greenl. 227.

J. G. Abbott & S. A. Brown, for the respondents, cited *Morse* v. *Aldrich*, 19 Pick. 449; *Stebbins* v. *Smith*, 4 Pick. 97; *Jones* v. *Richardson*, 5 Met. 247; *Bates* v. *Norcross*, 17 Pick. 14; *Colwell* v. *Alger*, 5 Gray, 67; Co. Lit. 365 *b*.

DUSTIN MARBLE *vs.* JOHN S. KEYES.

Evidence of an attachment of goods on mesne process against one possessing but not owning them, and of a return of such attachment upon the writ, is sufficient, in the absence of controlling evidence, to support an action against the officer for the conversion of the goods.

ACTION OF TORT, commenced on the 10th of January 1854, against the sheriff of Middlesex for the conversion by his deputy of a stock of goods. The defendant justified under an attachment and holding of the goods on a writ against Bailey Marble.

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At the trial in the court of common pleas, the plaintiff produced evidence tending to show that Bailey Marble had been the owner of the goods, which were in a shop occupied and kept by him; that the plaintiff received a bill of sale of them, dated on the 5th and delivered on the 6th of January 1854, and also took a formal possession of the goods and thereupon left them in possession of Bailey as his clerk to sell them; agreed with the owner of the shop to pay him rent for the use of it, and employed him to assist Bailey in the shop; and that sales had been made by him and Bailey of some few articles before the attachment; but there was no other apparent change of ownership from Bailey to the plaintiff.

The plaintiff then proved that on the 9th of January the defendant's deputy attached the goods as the property of Bailey, and put a keeper into the shop to hold possession of them under the attachment, but allowed Bailey to remain there. The plaintiff also put into the case the writ against Bailey Marble, with the return of the deputy thereon that he had attached the goods on the 9th of January; and pursuant to an application by the plaintiff in that writ on the 24th of January (after the commencement of this suit) caused the property to be appraised, and sold on the 3d of February.

The defendant objected that this evidence was not sufficient to prove a taking, upon which to maintain this action. But *Perkins*, J. ruled "that this evidence was sufficient to go to the jury upon the question of taking, and nothing to the contrary thereof appearing in the case, would justify the jury in finding such a taking; and that a legal attachment of goods, maintained by putting a keeper over them, was sufficient evidence of a taking." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

B. F. Butler, for the defendant. An officer's return of an attachment of personal property does not prove a taking which will subject him to an action of trespass or trover. *Merrill* v. *Sawyer*, 8 Pick. 397. *Boynton* v. *Willard*, 10 Pick. 166. The evidence showed that there was no removal of the property, but that it was left in the custody of the person with whom it was

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found; but did not show that the keeper remained in the shop, or made more than a formal attachment. Bailey's possession of the goods may have justified or caused an attachment of the goods as his property, which was abandoned on being informed of the sale to the plaintiff.

R. B. Caverly, for the plaintiff.

By the Court. The evidence offered was sufficient, in the absence of controlling proof, to entitle the plaintiff to a verdict.

Exceptions overruled.

Dustin Marble *vs.* John S. Keyes.

The owner of different chattels taken by one trespass brought two separate actions for their conversion, the second of which was tried while the jury were consulting upon the first, and, although the first action had not been pleaded in abatement of it, resulted in a verdict for the defendant, under the instructions of the presiding judge, to which the defendant excepted. The jury in the first action returned a verdict for the plaintiff, upon which judgment was rendered and, on exceptions, affirmed by this court. *Held*, that the plaintiff's exceptions in the second action must be overruled.

Action of tort against the sheriff of Middlesex for the conversion of a wagon and harness, attached by one of his deputies upon a writ against Bailey Marble. Writ dated February 9th 1854.

At the trial in the court of common pleas before *Perkins*, J., the plaintiff claimed title under a bill of sale from Bayley Marble dated January 5th 1854; and put in evidence the writ against Bailey Marble, and the officer's return thereon, showing that he had attached the harness and wagon, and also a stock of goods, included in the bill of sale, and for the conversion of which the plaintiff had brought an earlier action, which was tried next before this, and upon which the jury were then consulting, *ante*, 219. He then rested his case.

The defendant contended that the plaintiff could not maintain more than one action for different articles of property taken by the same trespass, and converted at the same time; and the

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court so ruled. The plaintiff then contended that this objection could only be availed of in abatement; but the court ruled otherwise.

The plaintiff then offered to prove another trespass and conversion of the property sued for, and that the harness and wagon were in a barn a quarter of a mile from the shop in which the stock of goods was, and could not have been attached at the same time, and that the plaintiff did not know of their attachment until a long time after the commencement of the action for the goods. But the court ruled "that the plaintiff having put in his evidence to show a particular conversion, and having rested his case upon the proof thus offered, would not now, upon this objection being made and ruled upon, be allowed to put in the evidence offered to make out a different conversion."

A verdict was thereupon taken for the defendant, and the plaintiff alleged exceptions, which were argued at the same time with the defendant's exceptions in the other case, *ante*, 219.

R. B. Caverly, for the plaintiff.

B. F. Butler, for the defendant.

By the Court. The rejection of the evidence offered by the plaintiff after he had rested his case was within the discretion of the presiding judge, and not a subject of exception. Whatever might have been the position of the plaintiff if he had continued to stand as he did at the time of the trial, we are of opinion that he cannot now prosecute these exceptions. Since this case was given to the jury, a verdict has been returned for the plaintiff in the first case, and he has obtained a judgment thereon in the court of common pleas, and an affirmation of that judgment in this court. That judgment is a bar to this action, and the entry in this case must therefore be

Exceptions overruled.

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GEORGE WING *vs.* JONATHAN P. BISHOP & another.

A mortgagee of chattels cannot maintain an action against an officer for attaching them as the property of the mortgagor, without first making the demand required by Rev. Sts. c. 90, §§ 78, 79, and St. 1844, c. 148, although his mortgage provides that upon the property being attached he may take immediate possession.

ACTION OF TORT for the conversion of personal property. At the trial in the court of common pleas before *Perkins*, J., the plaintiff gave in evidence a mortgage from one Rogers to himself, which provided that in case of attachment of the property he might take immediate possession; and also proved that in Bishop's presence and by his direction the other defendant, who was a deputy sheriff, attached and took the property, which was in possession of Rogers, upon mesne process in favor of Bishop against Rogers. Bishop gave in evidence an earlier mortgage from Rogers to himself. The other defendant was defaulted.

The judge ruled that, although Bishop had the earlier mortgage, "still, if the defendants did not take the property under said mortgage, but did take it by attachment on the writ in favor of Bishop against Rogers and under the direction of Bishop for another debt than that referred to in the mortgage, the fact that Bishop had such a mortgage would not help his defence, and the jury were to say whether in fact the defendants took under the mortgage or by the attachment."

Bishop requested the judge to rule "that as the property alleged to be converted was in Rogers's possession at the time of the alleged conversion and never in actual possession of the plaintiff, the plaintiff, under the conditions of his mortgage, had no such right to the immediate possession of said property, until a demand of the mortgage debt from Rogers was made, as to enable him to maintain this action for a conversion of the same."

But the judge declined so to rule; and instructed the jury "that if they were satisfied that the defendants took the property under an attachment for a debt against Rogers, then the

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plaintiff, under the stipulation in the mortgage providing that he might take possession upon such attachment being made, might maintain this action."

The jury returned a verdict for the plaintiff, and, upon being inquired of by the court, stated that they found that the defendants took the property under attachment only, and not under Bishop's mortgage. Bishop alleged exceptions.

G. A. Somerby, for the defendant.

E. F. Butler & N. St. J. Green, for the plaintiff.

BIGELOW, J. The trial of this cause seems to have proceeded throughout upon a misapprehension. As between the plaintiff and the defendant Bishop, the latter had the older and better title under his mortgage, and it is difficult to see how the plaintiff can maintain an action of trespass against Bishop for taking that which was his own. Nor can it make any difference that the defendant took it into his possession under an attachment for a debt other than that secured by his mortgage. The right of the plaintiff to recover in this action must depend on his title to the property at the time of the alleged trespass, and not upon the fact that the defendant asserted a right to it which was not tenable. The case necessarily turned on a comparison of titles, and the defendant's was clearly paramount to that of the plaintiff.

But the plaintiff fails to show any cause of action, on the ground that the property was taken by Bishop under an attachment, irrespective of his title to it by virtue of an older mortgage. The attachment was legal and valid as against the plaintiff until he made a demand of the officer for the amount due under his mortgage, and the time allowed for the payment of this amount had expired. Without proof of such demand and a failure to pay the sum demanded, the defendants were not tortfeasors. No such demand was proved at the trial. Rev. Sts. c. 90, §§ 78, 79. St. 1844, c. 148. *Exceptions sustained.*

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MICHAEL ROGERS *vs.* JONATHAN P. BISHOP & another.

The execution of a bond to dissolve an attachment on mesne process does not estop the surety to assert his own title in the property so attached against a subsequent attachment thereof by the obligee.

ACTION OF TORT for the conversion of personal property. At the trial in the court of common pleas it appeared that this property was attached on a writ in favor of Bishop against the plaintiff's son, together with property of the latter, and was claimed by the plaintiff of the attaching officer; that the plaintiff as surety and his son as principal gave bond to dissolve that attachment, and that after such dissolution the property was again attached and sold on another writ in favor of Bishop, which was the tort now sued for.

The defendants contended that the plaintiff by the execution of that bond had estopped himself to deny that the property now claimed by him was his son's, or to set up a title in himself. But *Perkins*, J. ruled that he was not so estopped; the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. A. Somerby, for the defendants, cited *Dewey* v. *Field*, 4 Met. 381; *Platt* v. *Squire*, 12 Met. 494; *Fay* v. *Valentine*, 12 Pick. 40.

THE COURT, stopping *B. F. Butler* & *N. St. J. Green*, for the plaintiff, *Overruled the exceptions.*

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Lexington and West Cambridge Railroad Company *vs* Fitchburg Railroad Company.

One railroad corporation leased its railroad to another, who agreed to equip it with engines, cars and other furniture, and to give as favorable accommodation to its business as if they owned it, and to run regular trains, and also extra trains when required, for which last they should be allowed "the actual cost of running the same;" and it was agreed that the lessees should collect the revenues of the road leased, and, before paying them to the lessors, take out a certain sum semiannually for running the trains over said road, and a certain proportion of the balance, for the use of their own road by such trains. *Held*, that the "actual cost" of the extra trains included only money actually paid out, and not a proportion of the expense of the lessees' road, or of the wear and tear of their track.

Held, also, that the lessees were bound to transport without extra charge wood and coal intended for and used upon that part of a brick yard at the junction of the two roads, which bordered on the road leased, and which were drawn over the lessees' road, and over a side track built by agreement between the two corporations and in part within the location of that road.

Held, further, that a subsequent agreement for an additional allowance to the lessees for certain freight for a specified time, having been (as was found by an auditor) "continued by mutual consent" until a later date, did not entitle the lessees to any compensation after that date, beyond that stated in the original agreement.

Action of contract on a written agreement, by which the plaintiffs agreed to lease their railroad for ten years from the 1st of September 1847 to the defendants, who agreed on their part to equip it with suitable and sufficient engines, cars and other furniture, and to run three passenger trains a day thereon, and special trains when necessary for the public accommodation on gala days, celebrations and other extraordinary occasions, and further agreed as follows:

"And also, whenever, from time to time, the increase of business upon the line shall warrant it, additional regular trains shall be established and run by the party of the second part, who shall be allowed, in addition to the sum hereinafter named, the actual cost of running the same. A freight train, either in connection with one of said trains, or separately, when the increase of freight may authorize it, shall be run daily, in each direction.

"And the said party of the second part doth hereby further agree that the cars and engines to be put upon said railroad shall be of good quality, and be always maintained in good con-

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dition, and be suitable in all respects, and also, that there shall be on such line a sufficient number of conductors, switchmen and attendants to take charge, with efficiency and despatch, of the freight and passenger business that may be offered, excepting such as may be, by a general rule, prohibited on the other roads run by the party of the second part, and that the trains upon said railroad, and the general accommodations given to the business of the line, shall be as favorable as they would be if the said railroad were actually owned by the party of the second part; and that the accommodations in the depots in Boston and Charlestown, for passengers and freight, respectively, that may belong to the business of said railroad, shall be provided upon the same principle."

The agreement also provided that the defendants should collect the revenues, and should retain out of them, 1st. Five thousand dollars semi-annually as a compensation for the equipment, running and transportation between the plaintiff's road and Charlestown or Boston; 2d. Thirty per cent. of the remaining balance of income for a compensation for the use of the defendants' road by such trains; 3d. The actual cost of necessary repairs of the plaintiffs' stations and fixtures; and pay over the residue to the plaintiffs; and that in case the increasing business of the line should require additional tracks, switches or other appendages, they should be provided by the plaintiffs upon the line of their own road, upon reasonable notice; and that all questions and disputes between the parties should be submitted to arbitrators, whose decision should be binding.

The facts material to the points argued in this court appeared by an auditor's report, upon which the case was argued as upon an agreed statement of facts, to be as follows:

The plaintiffs' railroad intersects with the Fitchburg Railroad at Hubbell's brick yard in West Cambridge, at which there is an extensive manufacture of bricks. About ten seventeenths of the bricks were made at that part of the yard bordering on that road, and about seven seventeenths at that part which bordered on the plaintiffs' road. The sheds and other arrangements for the manufacture of bricks on the last named part of the yard

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were constructed and used about two years before the making of the contract sued upon, and were connected with the Fitchburg Railroad by a side track built by the defendants, but paid for by the plaintiffs, partly within the location of the plaintiffs' road, and partly on Hubbell's land at his request. The wood was carried over the main track of the plaintiffs' road; the bricks and other freight to and from the yard over this side track only.

1. The plaintiffs sought to recover certain overcharges of the defendants for expenses of running the plaintiffs' road.

The defendants, in making up the actual cost of extra trains on the plaintiffs' road, charged the plaintiffs with a proportion of the entire annual cost and expense of the Fitchburg Railroad, including salaries, stations, interest on cars, wages of engineers, firemen, conductors and brakemen, and wear and tear of the defendants' track. But as it appeared "that no new engines or cars and no extra hands were required for the trains in question, and no additional compensation was paid to the men employed thereon, and these trains performed the same services for the Fitchburg Railroad for the distance they ran upon it, in the way of passengers and freight over that road, as the other regular trains of the defendants did," the auditor was of opinion that these items were overcharges, and might be recovered by the plaintiffs in this action, subject to the opinion of the court.

2. The plaintiffs claimed to be entitled to seventy per cent. of seven seventeenths of freight received for wood and coal carried to Hubbell's brick yard. The auditor permitted the plaintiffs, against the defendants' objection, to give in evidence an award, made pursuant to the agreement sued upon, upon a submission by the parties before a justice of the peace of a claim for freight delivered by the defendants during the year 1850; and which award contained this clause: "The freight, bricks and ice, received, or most conveniently and fairly receivable, on the Lexington and West Cambridge Railroad, however near the junction of the two roads, belong to the business of that road and are to be accounted for accordingly, under the contract between the parties, dated September 1st, 1847."

"It was in evidence that seven seventeenths of the wood and

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coal sent to the brick yard, over the Fitchburg road, was intended for and used at that part of it which bordered on the Lexington and West Cambridge Railroad; that it was sometimes left in the cars on the Fitchburg track and hauled to the other part of the yard by Hubbell's men, and sometimes was switched off and made to run on the side track by force of the Fitchburg engines."

The auditor "ruled that under the contract, and the award heretofore mentioned, this was freight properly belonging to the plaintiffs' portion of the brick yard; and as such allowed the claim; to which the defendants excepted."

3. The plaintiffs claimed seventy per cent. of overcharge of freight on brick, carried in April and May 1854.

It appeared that on the 5th of March 1852 the parties agreed in writing that the defendants should have an additional allowance of twenty cents per thousand for bricks manufactured upon that part of the brick yard bordering upon the plaintiffs' road, and transported over the Fitchburg Railroad from the 1st of May to the 31st of December 1852; and that at a meeting of the defendants' directors on the 16th of January 1854 it was voted that this agreement "be continued in force, so long as the present price for transporting bricks is maintained, for a term not exceeding one year." The auditor reported that this agreement "was continued by mutual consent till the spring of 1854, when the plaintiffs demanded a special freight train, which commenced running on the 19th of June 1854;" and "that the price of transporting brick was raised after the 1st of April 1854 from forty to sixty cents per thousand; and the defendants rendered an account to the plaintiffs, in which they credited the plaintiffs with seventy per cent. of one half the receipts for carrying bricks; but the plaintiffs claimed that they were entitled to seventy per cent. of the whole proceeds." And the auditor allowed their claim.

The auditor also allowed the plaintiffs to recover seventy per cent. of the difference between the cost of carrying certain bricks and the freight received therefor, between the 1st and 19th of June 1854, and before the special train began to run.

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J. G. Abbott & J. Dana, for the plaintiff.

H. C. Hutchins, for the defendants.

By the Court. 1. The term "actual cost," in the agreement declared on, means money actually paid out for extra trains. All the items of expense, which are objected to, would have been incurred whether the extra trains had been run or not, except the wear and tear of the defendant's track; and that was included in the thirty per cent. of tolls to be retained by the plaintiffs.

2. By the agreement sued upon the defendants took the entire charge of the freight and passenger business of the plaintiffs' road, and agreed that the trains upon it and the general accommodation given to its business should be as favorable as if that road were actually owned by the defendants. The wood and coal which the auditor held to be included within this agreement were to be used on that part of the brick yard bordering on the plaintiffs' road, and were in fact drawn over a side track, built pursuant to the agreement between the two corporations, and in part within the location of the plaintiffs' road. The auditor's ruling on this point was in accordance with the award upon a similar claim for an earlier period, and we think it was correct.

3. The auditor has found that the special contract made in 1852 was terminated by mutual consent in the spring of 1854. The first agreement thereupon revived, under which the defendants were entitled to but thirty per cent. of the net freight on bricks subsequently carried.

The rulings of the auditor upon all the points argued before us were correct. The exceptions to his rulings on other points have been either sustained or overruled by consent, and require no particular notice. *Judgment accordingly.*

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Edwin A. Clark *vs.* Lowell and Lawrence Railroad Company.

A common carrier who has received goods from a wharfinger, with whom they have been deposited by their owner without authority to forward them, has no lien on them for freight against the owner.

Replevin of lumber, upon which the defendants claimed a lien for freight over their railroad, and for money paid by them for freight on other lines of transportation connecting their road with Lake Winnipiseogee in New Hampshire.

At the trial in the court of common pleas, before *Morris*, J., the plaintiff introduced evidence tending to show that he procured the lumber in New Hampshire to build houses with in Lowell; and deposited it upon a wharf at the head of Lake Winnipiseogee, intending to have it transported over the Concord and Montreal Railway to Lowell; and had a conversation with Walker, the owner of the wharf, on the subject. There was conflicting evidence whether he gave Adams, the wharfinger, any authority to ship the lumber; but it appeared that Adams's duty was to take care of all the freight deposited upon the wharf, and to collect the charges thereon; and that he did send this lumber by way of the defendants' railroad to Lowell.

The defendants requested the judge to instruct the jury "that if Adams had charge of Walker's wharf, whereon the lumber was placed, and was authorized to receive all freight that was sent to it, and if the plaintiff put his lumber on the wharf for shipment, and if Adams, in the belief that he was acting for the plaintiff's interest, shipped it by the defendants' line of transportation, and if the defendants' line received it honestly and without any knowledge that the plaintiff designed to send it by another route, then the plaintiff was liable for the freight, and could not maintain this action; that Adams, as the keeper of the wharf, with authority to receive freight for shipment, was in possession of the lumber, as agent or servant of the plaintiff, and had authority to ship it, as such agent or servant; and if

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he did so ship it, and the defendants' line of transportation received it, and transported it in good faith, then the plaintiff was liable for the freight; and if Adams had exceeded his authority, he was liable to the plaintiff.

The judge declined thus to instruct the jury; but did instruct them "that the decision of the case turned upon the question of authority in Adams to make the shipment of the lumber; that Adams had no authority, merely by virtue of his situation and employment, to send the lumber as he did; but that if he had authority from the plaintiff, either expressed or implied, to make the shipment by the defendants' line, then the action could not be maintained; but if he had no such authority from the plaintiff, the verdict should be for the plaintiff." The jury found a verdict for the plaintiff and the defendants alleged exceptions.

T. Wentworth, for the defendants.

A. R. Brown, for the plaintiff.

Bigelow, J. This case must be governed by the decision in *Robinson* v. *Baker*, 5 Cush. 137. The jury have found that Adams had no authority, either express or implied, to forward the lumber by the defendants' line of transportation. In placing the property on board the boat by which it was carried and delivered to the defendants, he acted without authority and was a tortfeasor. He could therefore confer no right on the defendants to hold the lumber by virtue of any lien for its carriage. The right of property and possession was in the plaintiff, and he can well maintain replevin to recover the property.

Exceptions overruled.

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JAMES PHILLIPS *vs.* RICHARD SOULE, Administrator, & others.

By indenture, A. agreed to make certain advances to B. for building and finishing a house on A.'s land, and seventy days after its completion to convey the house and other land to B.; and B agreed to build the house and furnish all the labor and materials, and, upon delivery of the deed, to repay to A. all his advances with interest, and to pay a certain price for the land, either in cash or by his note payable in five years and secured by mortgage of the land. *Held*, that the agreement to deliver the deed and to pay the money were mutual and dependent stipulations, and that B. could not, four years after the completion of the contract, and two years and a half after A.'s death, elect to pay by note secured by mortgage; but that upon payment of the money according to the contract he was entitled to specific performance.

BILL IN EQUITY, filed in July 1855, against the administrators and heirs of Thomas W. Herrick, for the specific performance of an indenture by which Joseph S. Blois (who had since assigned all his rights to the plaintiff) covenanted and agreed with Herrick to build before the 1st day of July 1851, on Herrick's land, a dwelling-house, and furnish all labor and materials therefor; and, upon the completion of the house and the tender of a deed from Herrick of the house and lot and of an adjoining piece of land, to pay to Herrick a certain sum for the land and also the amount of all advances made by him during the building of the house, either in cash or by his negotiable note payable on the 1st of April 1855, with interest semi-annually, and secured by mortgage of the said house and land; and Herrick by a previous clause of the indenture covenanted and agreed, "at the expiration of seventy days from and after the complete and perfect fulfilment by the said Blois of the covenants and agreements hereinafter contained to be by him performed," to deliver a warranty deed of said land at the price agreed to be paid as thereinafter provided; and to make advances to Blois as he should proceed with the building of the house, amounting in all to $2500.

At the trial before *Merrick*, J., and a jury, at October term 1856, the plaintiff introduced evidence tending to show that he built and finished the house according to the indenture, and that Herrick made the advances of $2500, and other sums to enable

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him to finish the house; that, after the lapse of seventy days from the completion of the house, he requested Herrick to make the deed of the house and land according to the indenture, and that Herrick said he would do so as soon as he should obtain a deed of the adjoining piece of land from his vendor; that nothing further took place between the parties during the lifetime of Herrick, who died on the 31st of December 1853, and upon whose estate administration was granted to Soule in the March following. There was no evidence that the plaintiff ever paid or offered to pay to Herrick in his lifetime, or to any of the defendants since, the money to be paid on the conveyance of the estate to him, or made or offered to make his promissory note therefor according to the indenture.

Soule, being called as a witness for the plaintiff, testified that he had frequently told the plaintiff that he would convey the property if the plaintiff would pay up what was due, and that the plaintiff's reply was that he could not raise the money. In answer to a question by the plaintiff, Soule said he had never offered to convey the estate if the plaintiff would give him his note and mortgage of the premises.

Upon these facts, a verdict was taken for the defendants, and the case reported to the full court.

E. Ripley, for the plaintiff.

W. Brigham, for the defendants.

Bigelow, J. On the facts proved in this case we think a waiver of the strict performance of the original terms of the contract may fairly be inferred, and that the plaintiff is entitled to a conveyance of the land on fulfilling the stipulations on his part to be performed. The conveyance to be made by the intestate to the plaintiff was not of the nature of a condition precedent. The stipulations of the parties respectively were mutual and dependent, and the deed from Herrick to the plaintiff and the mortgage back to Herrick were to be simultaneous acts. *Kane* v. *Hood*, 13 Pick. 281.

After the long delay of the plaintiff in bringing his suit for the specific performance of the contract, we think he cannot equitably claim that the administrator shall now receive the

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note and mortgage for the sum due the estate under the contract, but that under the circumstances of the case he is bound to pay it to the administrator in money, on receiving a proper conveyance of the premises. *Decree accordingly.*

CHARLES GERRISH *vs.* HIRAM MACE.

The purchaser at a sheriff's sale on execution of an equity of redemption attached as having been conveyed in fraud of creditors may maintain a bill in equity to avoid the fraudulent conveyance and redeem the mortgages.

BILL IN EQUITY to redeem land in Groton from two mortgages. The bill alleged that Lafayette Blood, being the owner of the land subject to the mortgages, (one of which was created by himself and one by a previous owner, and both of which had been assigned to the defendant, who had entered to foreclose,) conveyed the same in fraud of his creditors to one who took part in the fraud, and whose right and knowledge the defendant had; and that after said fraudulent conveyance Blood's interest in the land was attached by his creditors, who subsequently recovered judgment, and duly sold Blood's interest on execution by auction to Nathan R. Thayer, who subsequently conveyed to the plaintiff.

The defendant demurred, on the ground that the plaintiff had no title in the premises, and no right to redeem, or to equitable relief.

B. F. Butler, for the defendant. The conveyance of Blood to Hoyt could not be avoided for fraud by the grantor, but only by his creditors. The plaintiff was not a creditor, and did not, by purchasing the equity of redemption at the sheriff's sale on execution against Blood, acquire the rights of a creditor, but only the rights of Blood. Rev. Sts. *c.* 73, §§ 7, 15, 16, 31, 37, 38. *Green* v. *Kemp*, 13 Mass. 515. *Russell* v. *Dudley*, 3 Met. 147. *Van Deusen* v. *Frink*, 15 Pick. 449. St. 1844, *c.* 107. *Foster* v. *Durant*, 2 Gray, 538.

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J. G. Abbott, (*B. Russell* with him,) for the plaintiff.

Shaw, C. J. Bill by the assignee of a purchaser at a sheriff's sale of an equity of redemption. He sets forth several valid mortgages which through mesne conveyances have come to the defendant, amongst which was one made by Lafayette Blood, who had the equity; and also sets forth another conveyance, made by Blood, to defeat and defraud his creditors, and alleges that certain creditors of Blood attached Blood's right of redemption, and caused it to be sold on execution at auction. This was the proper mode provided by law for the creditors of Blood to avail themselves of his actual right of redemption, avoiding, as they had a right as creditors to do, all conveyances made to defeat said creditors.

Conveyances made by debtors to prevent their property from being attached for debts due are ordinarily said to be void; whereas it would be a little more accurate to say that they are voidable as against their creditors, and such creditors may, when any occasion arises, avoid them, by holding them as an actual nullity, when as between other parties they may be held good. In the present case, it seems to us, that when the plaintiff, in seeking to redeem of the defendant, admits that the defendant holds a valid mortgage made by Blood; and knows also that the defendant holds a conveyance of the equity ostensibly made by Blood, he has a right to set forth all the circumstances which rendered said conveyance void as against creditors, and that those who had a right to avoid such conveyance did so and attached the equity, which is not attachable property; and the defendant by his demurrer admits the truth of the facts thus pleaded to avoid the conveyance, and so admits the fraud.

It is said whether a conveyance is fraudulent or not is a question of fact to be proved; but this is not so. In *Marden* v. *Babcock*, 2 Met. 99, the facts were not found, but only certain suspicious circumstances and badges indicative of an intent to defraud, and then it would be necessary to go to a jury to find the fact of actual intent to defraud. But it is a question of law when the facts on which it depends are well pleaded on one

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side, and by demurrer admitted on the other; and the court will then adjudicate accordingly.

Now the right of redeeming the estate upon payment of the amounts actually and lawfully due and payable was the right attached by the creditors, and was the same right sold by the sheriff at auction, and passed to the plaintiff's predecessor, and through him to the plaintiff, which right the plaintiff seeks to enforce by this bill, as he may rightfully do. *Van Deusen* v. *Frink*, 15 Pick. 449. Rev. Sts. c. 73, § 38.

Nor is this right affected by the principles laid down in *Green* v. *Kemp*, 13 Mass. 515, and more especially *Russell* v. *Dudley*, 3 Met. 147. The latter was decided on the ground that though a creditor might avoid a fraudulent mortgage and treat it as a nullity; yet that he has his option to do so or not at his own election; and in the case supposed, by selling only the right to redeem, he had expressed his option on the record, not to avoid the mortgage.

In order to avoid the conveyance in this case, the creditor was not bound to levy specifically; he had his option to levy or sell on execution, and if he elected to sell at auction, the purchaser would take the right to avoid all fraudulent conveyances and incumbrances. *Demurrer overruled.*

ASAHEL C. PALMER *vs.* GEORGE S. STOCKWELL.

A party to a written agreement for building a house, the plan of which is subsequently altered by oral consent at his suggestion so as to postpone the work without fixing any new time for its completion, cannot afterwards object to its not having been completed at the time originally agreed upon.

Upon the balance of an unliquidated and contested account, interest can be recovered only from the date of the writ, and not from a previous demand of payment.

ACTION OF CONTRACT for work done and materials furnished in building a house. The case, as shown by an auditor's report, upon which, as upon an agreed statement, it was submitted to the decision of the court, was as follows:

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The plaintiff agreed in writing with the defendant to build him a house, to be completed by the 1st of July 1851. After the plaintiff had begun to work under this agreement, a verbal agreement was made between the parties by which the plan of the house was altered and its size enlarged, and this change of plan produced a delay in the prosecution of the work from April 12th to April 22d 1851. In the latter part of August, the house not having been completed, the defendant forbade the plaintiff to proceed further with the work; notwithstanding which the plaintiff went on, and completed the house in October, but not according to the specifications in the agreement, and the house was worth one hundred and fifty dollars less than it would have been if so built. On the 14th of October the plaintiff offered the key of the house to the defendant, and demanded a settlement of accounts between them, and also a mortgage in part payment; but the defendant refused to receive the key or give the mortgage. At the time of this demand the amount due to the plaintiff was unliquidated; and there were mutual contested accounts between the parties, growing out of the building of the house.

The defendant objected to the introduction of evidence of the oral agreement, and contended that the plaintiff could recover only for the work done up to the time when he was forbidden to proceed, deducting the defendant's damages for the non-fulfilment of the contract. But the auditor ruled that as the defendant had moved into and occupied the house, he was bound to pay the plaintiff its value, deducting the damage so sustained by the defendant; and that, after deducting all claims in set-off, including $100 for damages for non-completion of the contract, the plaintiff was entitled to recover $227.37, with interest from the date of the writ, and not, as the plaintiff contended, from the time of the demand.

M. G. Cobb, for the plaintiff, cited *Cummings* v. *Arnold*, 3 Met. 486; *Stearns* v. *Hall*, 9 Cush. 31; *Dodge* v. *Perkins*, 9 Pick. 388; *Barnard* v. *Bartholomew*, 22 Pick. 294; *Bassett* v. *Sanborn*, 9 Cush. 58.

J. Q. A. Griffin, for the defendant, cited *Hayward* v. *Leonard*,

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7 Pick. 187; *Whiting* v. *Sullivan*, 7 Mass. 109; *Brewer* v. *Tyringham*, 12 Pick. 547.

Bigelow, J. 1. It appears that after the written agreement was made, the plan of the house was altered and enlarged at the defendant's suggestion, so that it would take more time to build, and yet no new stipulation was made as to the time of its completion. Time thereby ceased to be of the essence of the agreement, and the defendant cannot now, in defence of an action on the agreement, avail himself of a delay in its strict performance by the plaintiff, which was caused in part by his own act.

2. The sum due the plaintiff having been unliquidated and uncertain, dependent upon an adjustment of debts and credits between himself and the defendant at the time of the demand for payment, interest should be allowed on the balance found due, not from the time of such demand, but from the date of the writ only. *Brewer* v. *Tyringham*, 12 Pick. 547.

Judgment for the plaintiff.

Sarah W. Howard *vs.* Ebenezer Bryant.

A legacy to a woman before marriage is reduced to possession by her husband by receiving a quitclaim deed from the testator's residuary devisee, upon condition that he should pay all legacies which such devisee was bound to pay, of which this was one.

Action of contract to recover a legacy given to the plaintiff, when sole, by her father's will, in these terms: "I give to my daughter Sarah W. Bryant one hundred and fifty dollars, seventy five dollars to be paid to her by my son Ebenezer Bryant when he arrives to the age of twenty two years, and seventy five dollars more at the decease of my said wife."

The defendant was named in the will as principal devisee and residuary legatee, subject to a life estate in the testator's widow, who died before this suit was brought. The plaintiff married

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John Howard in 1808. The defendant arrived at the age of twenty two in 1809, and in 1813 conveyed all the estate so devised and bequeathed to him to John Howard, by quitclaim deed in the usual form, and containing, after the description of the premises, these words: "And it is considered that the said John Howard is to pay all the legacies which I am bound to pay by my father's will." Howard died intestate in 1824, and the plaintiff was appointed administratrix of his estate, and demanded payment of the legacy before bringing this action. The parties submitted the above case to the judgment of the court.

A. V. Lynde, for the plaintiff, cited *Legg* v. *Legg*, 8 Mass. 99; *Hayward* v. *Hayward*, 20 Pick. 526, 530; *Daniels* v. *Richardson*, 22 Pick. 570; 1 Dane Ab. 342–344; *Brotherow* v. *Hood*, Com. R. 725; 1 Bright on Husb. & Wife, 37.

J. P. Converse, for the defendant, cited *Commonwealth* v. *Manly*, 12 Pick. 173; *Tuttle* v. *Fowler*, 22 Conn. 58; *Bates* v. *Dandy*, 2 Atk. 207; *Reese* v. *Keith*, 11 Sim. 388; *Doswell* v. *Earle*, 12 Ves. 473; *Bosvil* v. *Brander*, 1 P. W. 458; Clancy on Husb. & Wife, (Amer. ed.) 138, 139.

METCALF, J. The legacy given to the plaintiff by her father did not, on her marriage, vest absolutely in her husband. It was a chose in action which survived to her on his death, unless he had reduced it to possession, or released it, or had made a valid assignment of it, or had, in some other way, legally barred her right to it. And any lawful exercise of an act of ownership, by a husband, over his wife's chose in action, by which he appropriates it to his sole use, is such a reduction of it to possession as bars her right of survivorship. In this case, the legal effect of the facts is, that the plaintiff's husband received the amount of her legacy, by applying it towards payment for the land which he purchased of her father's residuary devisee, and in which she became entitled to dower.

Plaintiff nonsuit

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President, Directors and Company of the Framingham Bank *vs.* Gay & others.

To a declaration which avers the making of a promissory note by the defendant, payable to the plaintiff, and that the defendant owes him the amount of said note, an answer that the defendant does not owe the plaintiff in manner and form declared on, and leaving him to prove the same, does not put the signature in issue.

Action of contract on a promissory note. The declaration avers, "that the defendants made a promissory note payable to the plaintiffs or order, a copy whereof is hereunto annexed; and the defendants owe the plaintiffs the amount of said note and interest thereon." A copy of the note was annexed.

The defendants "answer upon their personal knowledge and belief that they do not owe the plaintiffs in manner and form declared on, and leave the plaintiffs to prove the same."

At the trial in the court of common pleas, the defendants objected to the plaintiff's reading the note to the jury without proof of the signatures. But *Aiken*, J. overruled the objection, and the verdict being against the defendants, they alleged exceptions.

E. Ripley & F. W. Pelton, for the defendants. The defendants sufficiently denied the allegations in the declaration, by "leaving the plaintiffs to prove the same," and by expressly and precisely denying the allegation that they owed the plaintiffs, which was the only statement, and a sufficient one, of any cause of action. *Woodbury* v. *Jones*, 3 Gray, 261.

C. R. Train, for the plaintiffs.

Merrick, J. It is averred by the plaintiffs that the defendants made the promissory note, of which a copy is annexed to the declaration. This is a substantive and material fact, and both the allegation and proof of it are essential to the maintenance of the present action. It is alleged and set forth in their declaration with substantial precision and certainty; for the plaintiffs adopt and follow, exactly in its very words, the form prescribed for use in such cases by the statute. The answer of

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the defendants does not deny this distinct allegation in clear and precise terms; and, if strictly considered, cannot be regarded as any denial of it at all. They aver that they do not owe the plaintiffs in manner and form as is set forth in their declaration; but this is no denial that they made the promissory note, and thereby became debtors to those who should afterwards lawfully hold it. They may have signed it, and thereby assumed the obligation of paying its contents according to its tenor, and yet still it may have been true that, at the time of the commencement of the action against them for the recovery of the amount alleged to be due upon it, they owed the plaintiff nothing on account of it. It may in the mean time have been paid, or they may have been released and discharged from the obligations it originally imposed upon them, either by the act of a *bona fide* owner of the instrument, or by operation of law. They might therefore safely and properly affirm that they did "not owe the plaintiffs," though they could not justly or truly deny that they ever made or executed the note declared on. And as they did not in their answer deny in clear and precise terms the allegation made by the plaintiffs of this substantive fact, the plaintiffs were rightly allowed by the court to read the note to the jury without first offering any evidence that the signatures of the several defendants were true and genuine, because the statute expressly declares that a substantive fact, so averred, shall for want of such a denial be deemed to be admitted by the party who is required to answer it. *St.* 1852, *c.* 312, §§ 14, 26, 84. *Exceptions overruled.*

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HARVEY L. KIMBALL *vs.* JEREMIAH B. BRADFORD.

The vendor of a house agreed in writing with the purchaser to "secure a supply of well water," to do certain work and pay certain charges upon the house. *Held*, that he could not show that at the same interview at which this agreement was delivered, and immediately after its delivery, the purchaser orally agreed to discharge him from this agreement upon his putting into the house a proper apparatus to conduct water from a certain aqueduct.

ACTION OF CONTRACT on this agreement: "This is to certify that, having this day sold to Harvey L. Kimball a house on Canal Street, I on my part am to buy and put up a marble chimney piece, worth sixteen dollars, in the front room, make the floors tight and front doorway, to lath and plaster the cellar, and secure a supply of well water, to pay the interest on mortgage, and on eight hundred and ninety dollars paid for the house, and vacate the house the first of April next. Witness my hand this the twentieth day of January, eighteen hundred and fifty three. J. B. Bradford."

Trial in the court of common pleas, before *Mellen*, C. J., who signed this bill of exceptions:

"At the trial the defendant offered to show that at the time the written paper sued on was made and delivered, after the same was delivered, and right upon the delivery, the plaintiff orally agreed with the defendant to discharge him from all obligation thereon and cancel the paper whenever the defendant would put a proper apparatus into the house named in the agreement for conducting water from an aqueduct in Oak Street, into which aqueduct the defendant had a right to insert pipes. To this evidence the plaintiff objected, and it was excluded by the court. A verdict was rendered for the plaintiff. The defendant thereupon excepted."

J. Q. A. Griffin, for the defendant. The agreement sued upon might be settled and discharged by an oral agreement. The testimony offered and excluded was to show such settlement and discharge, after the agreement had been fully completed,

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though before the parties separated; and not to vary the terms of the instrument. *Cummings* v. *Arnold*, 3 Met. 489. *Richardson* v. *Hooper*, 13 Pick. 446.

M. G. Cobb, for the plaintiff, cited 1 Greenl. Ev. § 275; Chit. Con. (8th Amer. ed.) 101; *Warren* v. *Wheeler*, 8 Met. 97; *Stackpole* v. *Arnold*, 11 Mass. 31; *Hunt* v. *Adams*, 7 Mass. 518; *Trustees in Hanson* v. *Stetson*, 5 Pick. 506; *Spring* v. *Lovett*, 11 Pick. 417; *Goodell* v. *Smith*, 9 Cush. 592.

By the Court. The written agreement must be taken to be the complete expression of the intent of the parties. The oral evidence offered went to show that at the same interview, immediately after the delivery of the writing, and as part of the same transaction, the parties agreed upon a substitute for one of its terms. It was therefore rightly rejected.

Exceptions overruled.

William S. Chapin *vs.* The Inhabitants of Marlborough.

The narration by a patient to his physician of the cause of injuries received several months previously is not admissible as evidence of that cause.

Action of tort for injuries received by the plaintiff on the 11th of January 1856 from a defect in a highway.

At the trial in the court of common pleas before *Mellen*, C. J., the plaintiff called a physician, who testified "that he saw the plaintiff for the first time on the 2d day of June 1856, and that the plaintiff showed him his leg and wished him to examine it; that the plaintiff complained of extreme pain in the leg; and said he had been struck by a horse, some number of months before, four or five months before, on that leg." To this narration the defendants objected; but the court admitted the testimony. The verdict was for the plaintiff, and the defendants alleged exceptions.

J. Q. A. Griffin, for the defendants.

C. R. Train, for the plaintiff.

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METCALF, J. The exception must be sustained, which was taken to the admission of the plaintiff's statement to his physician that his leg had been struck by a horse. It was a statement of a fact, and was used as evidence of that fact. It was therefore wrongly admitted. *Willis* v. *Bernard*, 8 Bing. 382. The rule of evidence, in cases like this, was rightly announced by Mr. Justice Bigelow, in *Bacon* v. *Charlton*, 7 Cush. 586, as follows: "Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. There are ills and pains of the body, which are proper subjects of proof in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a *present* existing pain or malady." The defendants are entitled to a new trial, in consequence of the admission of the plaintiff's statement. *Exceptions sustained.*

GEORGE LANE *vs.* JOSEPH S. BRYANT.

While B. was in the act of occupying a public square with his wagon, A. passed by with his carriage, and occupied part of the same square, and a collision ensued, by which A. was injured. *Held*, that if A. used due care and diligence and B. did not, A. could recover damages of B.

In an action to recover damages sustained by a collision between the defendant's and the plaintiff's carriages, evidence that the defendant's servant, who had charge of his carriage, immediately after the collision, and while the defendant was being extricated from his carriage, and while the crowd was about, said that the plaintiff was not to blame, is not admissible, either as part of the *res gestæ*, or to contradict the testimony of the servant.

ACTION OF TORT to recover for damages occasioned by the defendant's team running into the plaintiff's carriage.

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At the trial in the court of common pleas before *Aiken*, J., it appeared that as the plaintiff was driving in Court Street in Boston, near the entrance of Court Square, he passed along the side of a wagon drawn by three horses, in charge of the defendant's servant, with the intention of driving past the wagon and down the street; but, finding that he could not pass as he expected, because the leading horse of the defendant's wagon turned several times as if about to enter Court Square, and then back, passed into Court Square and there stopped close by the sidewalk; and while there the defendant's team ran into and crushed his carriage.

There was contradictory evidence as to the plaintiff's precise position in the square, and his manner of getting there. There was evidence tending to show that there was room in the square for the defendant's team to pass by the side of the plaintiff's carriage; and there was no evidence tending to show that the plaintiff had occupied any part of the square to the exclusion of the defendant's team.

The defendant requested the court to instruct the jury "that if the jury found that the defendant's servant was in the act of occupying Court Square with his team, the plaintiff would have no right to pass by and occupy said square himself to the exclusion of the defendant's team, and the plaintiff could not recover for any damage which might have happened to him by the defendant's team running into the plaintiff's while the plaintiff's was taking and occupying said square."

The court refused to give this instruction, but instructed the jury on that point thus: "If the jury find that the defendant's servant was in the act of occupying Court Square with his team, and the plaintiff passed by and occupied said square as he did, (and the jury were to determine upon the conflicting evidence how the team and carriage came where the collision happened,) the plaintiff would not thereby as matter of law deprive himself of his right to recover in this action; provided, in driving in, placing his carriage and remaining there, as he did, he was in the exercise of due and ordinary care; and the defendant's servant by the want of ordinary care on his part in the manage-

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ment of his team came into collision with the plaintiff's team, and thereby caused the injury to the plaintiff; and that the burden was upon the plaintiff to show that he was in the exercise of ordinary care, and that the defendant was not."

At the trial, the defendant's servant having testified that he did not excuse the plaintiff from blame at the time of the accident, the plaintiff was allowed by the court, against the objection of the defendant, to ask one of his witnesses, "what the servant said to the plaintiff at the time of the accident, and while the plaintiff was being extricated from his carriage, and while the crowd was about." And the witness answered that the servant had said that the plaintiff was not to blame for what had occurred.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

M. G. Cobb, for the defendant, to the point that the instructions were erroneous, cited *Bolton* v. *Colder*, 1 Watts, 360; *Brooks* v. *Hart*, 14 N. H. 307; *Palmer* v. *Barker*, 2 Fairf. 338; *Fales* v. *Dearborn*, 1 Pick. 345.

J. Q. A. Griffin, for the plaintiff.

Bigelow, J. 1. The instructions asked for by the defendant were rightly refused, and those given were accurate and well adapted to the facts in the evidence.

2. The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred, and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month afterwards. *Lund* v. *Tyngsborough*, 9 Cush. 36.

Nor was the evidence admissible to contradict the testimony of the defendant's servant. He was asked on cross-examination by the plaintiff's counsel whether he did not excuse the plaintiff from blame at the time of the accident. His answer to this

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question could not be contradicted by the plaintiff. It was irrelevant and immaterial to the issue. The opinion of the witness on the subject was incompetent. The real question was, who was actually to blame, and that was to be determined by the jury by the facts in the proof. The plaintiff was not bound by the opinion or declaration of his servant on this question.

Exceptions sustained.

ALMIRA DURELL *vs.* JABEZ G. HAYWARD.

A husband, who has buried his wife in a public burial ground, is not liable as a trespasser for removing a grave stone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another.

ACTION OF TORT for taking and carrying away a grave stone from the grave of Harriet M. Hayward, daughter of the plaintiff and wife of the defendant.

At the trial in the court of common pleas, it appeared that said Harriet died on the 13th of June 1852, aged twenty five years and two months; that the defendant caused her to be buried at his own expense, and with the consent of the proper authorities, in the public burial ground in Charlestown; that just before June 1855 the plaintiff, without the defendant's knowledge or consent, procured and caused to be put up at the grave a grave stone with this inscription: "In memory of Harriet M. Hayward, daughter of David and Almira Durell, born April 11th 1828, died June 13th 1853;" that she obtained no license for so doing; but that parties interested usually put up such stones as they desired in memory of their deceased friends, without any license or interference of the public authorities; that the defendant, as soon as he discovered this stone, caused another to be made and erected at the grave, and the stone put there by the plaintiff to be carried away, without any notice to or consent of the plaintiff; (which was the tort complained of,)

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and preserved it, and after this action was brought tendered it to the plaintiff, who refused to receive it.

Upon this evidence *Mellen*, C. J. ruled "that the plaintiff had a right to erect the stone in memory of her daughter as she did; that the defendant, if there was anything upon the stone disagreeable to his feelings, could not remove the stone and carry it away without first giving notice to the plaintiff; and that the subsequent tender of the stone to the plaintiff was of no avail in the matter of damages." The jury returned a verdict for the plaintiff for the full amount claimed, and the defendant excepted.

M. G. Cobb, for the defendant.

J. Q. A. Griffin, for the plaintiff.

BIGELOW, J. The plaintiff had no right to erect a stone at the grave of the defendant's wife without his knowledge or consent. The indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long established usage of the community. The defendant had therefore a right to remove the stone which the plaintiff had placed over the grave of his wife, in order to put in its stead the one procured by himself; and having taken it down without injury, and holding it in his possession, ready to be delivered up to the plaintiff on her demand therefor, he has done no act for which an action of trespass will lie. *Exceptions sustained.*

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Nathaniel L. Dayton & another *vs.* Philbrick Crane & another.

Since the *St.* of 1855, *c.* 363, a certificate of discharge under the insolvent laws of this commonwealth does not protect a debtor, who owed no debts here when the proceedings in insolvency were instituted, from debts contracted while residing in another state, before that statute took effect.

Action of contract on a negotiable promissory note, made by the defendants on the 9th of April 1855, and indorsed to the plaintiff. Crane was defaulted. Tasker, the other defendant, pleaded a certificate of discharge obtained by him under proceedings in insolvency commenced in 1856 in this commonwealth, in which he was described as of Lowell.

At the trial in the court of common pleas, the plaintiff proved the making of the note at Manchester, N. H. and that Tasker then resided there; and rested his case. Tasker introduced no evidence but his certificate of discharge, which *Morris*, J. ruled was a bar to the action against him; the jury returned a verdict accordingly, and the plaintiff alleged exceptions.

W. P. Webster, for the plaintiff.

R. B. Caverly, for Tasker. As the plaintiff and Tasker both reside in this commonwealth now, it is immaterial where the note was made, or where Tasker then resided. *Marsh* v. *Putnam*, 3 Gray, 551. The *St.* of 1855, *c.* 363, cannot apply to this contract, made before it was passed.

Bigelow, J. This defendant, at the time of the making of the note in suit, was not an inhabitant of this commonwealth, nor does it appear that when the proceedings in insolvency were instituted he owed any debts here. He was therefore, by the *St.* of 1855, *c.* 363, not entitled to take the benefit of those laws. We do not decide that if it had appeared that at the time of the institution of proceedings in insolvency he owed debts contracted after he removed to and became a resident in this commonwealth, his discharge would not have been valid. No such question was argued. *Exceptions sustained*

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Mary M. Boyle *vs.* Thomas F. Burnett.

A case ordered by the court of common pleas, after its final determination there, to be continued for the allowance of exceptions, may be entered in this court at the first term after their actual allowance.

At the trial of a bastardy process, the complainant cannot introduce evidence that five or six years previously she had a child by the respondent, which he and his relations acknowledged as his.

It seems, that in a suit for the maintenance of a bastard child, the complainant cannot introduce evidence that the respondent's relations acknowledged the child as his.

Bastardy process. At the trial in the court of common pleas at December term 1855 before *Sanger*, J., the complainant, not having brought herself within the provisions of the Rev. Sts. *c.* 49, was not admitted as a witness; but was permitted, against the objection of the respondent, to introduce evidence that five or six years before the making of the original complaint, (which was filed during her pregnancy,) she had had a child by the respondent, and that he had acknowledged it as his own; and also evidence that some members of the family of the respondent's father had treated that child as the respondent's. The respondent, being found guilty, alleged exceptions.

The case was continued by the court of common pleas for the allowance of exceptions until December term 1856, when the exceptions were allowed and signed, and they were entered in this court at April term 1857.

B. F. Butler, for the complainant, moved to dismiss the exceptions, upon the ground that they should have been entered at the next term of this court after the determination of the case in the court of common pleas. Rev. Sts. *c.* 82, §§ 6, 14.

P. Willard, for the respondent.

The Court held, that as the case had been continued by order of the court of common pleas for the allowance of exceptions, the exceptions might be entered in this court at the next term after their allowance, within the rule laid down in *Barstow* v. *Marsh*, 4 Gray, 166.

The case was then argued by the same counsel.

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MERRICK, J. All the evidence respecting the child born of the complainant five or six years previous to the institution of proceedings against the respondent upon her present accusation should have been excluded. His acknowledgment that he was the father of that child could have no tendency to show his guilty connection with the mother at a point of time many years subsequent to its birth. And certainly the conduct of any of the relatives or members of the family of the respondent in their treatment of the child, at or during any one period of time, cannot be thought to afford any proof of his criminal intercourse with the complainant at another period remote and distant from the first. He is liable in no degree to be affected by anything which others, however nearly allied to him they may have been, may have said or done concerning his conduct. This would be perfectly true even if what was proposed to be proved had direct and immediate reference to the charge now preferred against him. But the evidence which was allowed to go to the jury did not purport to have any such bearing; it related to events and transactions remote and altogether different from those on which the maintenance of the present prosecution depends. It was therefore irrelevant and foreign to the issue to be tried between the present parties and should have been rejected.

Nor can any reason for allowing this evidence to be laid before the jury, be found in the suggestion made in the argument of the complainant's counsel, that it tended to show that there was a subsisting intimacy between the parties at or near the time of the occurrence of the event which lies at the foundation of the present prosecution, and thus rendered it at least not improbable that the accusation against the defendant might be true. The occurrences themselves, and the periods of time during which the conduct of the parties in one is upon this assumption to be inferred from their conduct and behavior in the other, are too distinct and too widely separated to admit of the proposed comparison. In the long interval of years which elapsed between the births of the two children, alienation or hostility may have succeeded to an early intimacy, or the parent

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of the first may have ceased altogether, long before the occurrence of any circumstances connected with the existence of the second, to continue any personal acquaintance.

But the general rule of law in relation to this species of evidence is decisive of the question. Though proceedings like this against the respondent, are now considered and declared by our statutes to partake so slightly of the character of public prosecutions that they are to be prosecuted in courts instituted for the trial, and having jurisdiction, of civil actions, yet they are founded upon accusations in their nature criminal. *Hill* v. *Wells*, 6 Pick. 104. *Williams* v. *Campbell*, 3 Met. 209. St. 1851, c. 96. And in both civil and criminal cases the law requires that the evidence shall be confined to the point in issue, and therefore it is not competent to show the existence of facts tending to prove the commission of another distinct offence for the purpose of raising an inference that the accused committed the offence in question or was guilty of the charge preferred against him. Rosc. Crim. Ev. (2d ed.) 57. 1 Greenl. Ev. §§ 51 *& seq.*

The rule of law, stated in the passage in Mr. Greenleaf's Treatise on Evidence, § 105, to which reference is made by the counsel for the complainant, is applicable solely to questions of pedigree. That rule stands upon peculiar reasons in relation to the rights of succession and inheritance of legitimate children, or of those having rights as such. It is wholly inapplicable to questions of paternity which arise under our statute relative to the support and maintenance of children born out of wedlock.

Exceptions sustained.

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TEMPLE TEBBETTS *vs.* GEORGE GODING.

In declarations for slander, the *St.* of 1852, *c.* 312, has not dispensed with the necessity of averring the facts and circumstances which render actionable words not in themselves so.

A declaration for slander, which alleges that T. the plaintiff owned a certain building; that said building was insured, and burned, "and that afterwards the defendant publicly, falsely and maliciously accused the plaintiff of wilfully and maliciously burning the said building, with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: 'T. burned the mill himself,'" is bad, because it does not charge the defendant with any crime.

SLANDER. "And the plaintiff says that on the twelfth day of July 1855 he was the owner of a certain building, to wit, an oakum mill at Lowell, and that said building was insured against loss and damage by fire, and was consumed; and that afterwards the defendant publicly, falsely and maliciously accused the plaintiff of wilfully and maliciously burning the said building with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: 'Tebbetts was seen in the engine room late in the afternoon before the fire scattering oakum around the engine, by a man who looked through the cracks of the partition.' 'I have no doubt about the burning of the mill.' 'I think it was burnt by Tebbetts.' 'Tebbetts burnt the mill himself.'"

The defendant demurred, because "the words which the plaintiff alleges that the defendant spoke of the plaintiff do not import in their ordinary signification the commission of any crime or any criminal offence by the plaintiff, and there is not special damage alleged in the declaration."

T. H. Sweetser, for the defendant.

B. F. Butler & R. B. Caverly, for the plaintiff, cited *Pond* v. *Hartwell*, 17 Pick. 269; *Allen* v. *Perkins*, 17 Pick. 369; *St.* 1852, *c.* 312, § 2, and forms annexed; *Gardner* v. *Dyer*, 5 Gray, 22.

BIGELOW, J. The practice act, *St.* 1852, *c.* 312, has not changed the rule of law, which requires the plaintiff in an action for slander to allege the extrinsic facts or circumstances which are necessary in order to give significance to the words spoken,

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and render them intelligible to the court and jury in the sense in which they were spoken, as importing a charge of crime. This is the office of a *colloquium*. By the note appended to the form of declaration in slander, in the schedule of forms annexed to the practice act, it is obvious that it is still essential to aver the facts and circumstances which render the words actionable.

The declaration in the present case is insufficient in this particular. The words spoken by the defendant import no charge of crime. Standing by themselves, they do not even indicate whether the burning was intentional or the result of carelessness. This amounts to nothing more than that the act of the plaintiff caused his own mill to be destroyed, which might have been lawfully and innocently done.

Nor is the meaning of these words enlarged or changed by the preliminary averments in the declaration. It is not made to appear by them that the defendant at the time the words were uttered was speaking of the insurance on the building, or even that he knew that any such insurance existed. If that was not the subject of conversation at the time, and, *a fortiori*, if the defendant did not know of the insurance, he could not by the words charged have intended to accuse the plaintiff of setting fire to the building, with intent to injure and defraud the insurers. The case bears a strong resemblance to *Bloss* v. *Tobey*, 2 Pick. 320. *Demurrer sustained.*

VANDOLO E. WHITCOMB *vs.* SYLVESTER JACOBS.

A writ of entry is maintained by proof of a mortgage to the demandant, an entry for foreclosure thereof, and a quitclaim deed to him of the equity of redemption before such entry for foreclosure, if the tenant relies on a title derived from the mortgagor since such entry.

Service of a writ of entry, brought against a spendthrift, upon him and his guardian, and a general appearance of counsel for the defence, will support a judgment for the demandant.

WRIT OF ENTRY to recover land in Littleton. Plea, nul disseisin. Trial before *Merrick*, J., who reserved for the decision of the full court the following case: . . .

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The demandant offered in evidence a warranty deed of the premises from Ezekiel Wright to Justus L. Whitcomb, dated August 28th 1844, and a mortgage back of the same date, which through mesne assignments was assigned to the demandant on the 25th of April 1849; and all these deeds and assignments were duly acknowledged and recorded. The demandant also offered in evidence a certificate of an entry upon the premises on the 20th of October 1849, in order to foreclose the mortgage, and duly attested and recorded; also a quitclaim deed of the premises to him from Justus L. Whitcomb, dated February 14th 1849, and duly acknowledged and recorded.

In behalf of the tenant was offered in evidence an execution issued on a judgment against Justus L. Whitcomb on the 18th of February 1854, and afterwards duly levied upon the premises, and returned and recorded.

There was also evidence that before this action was brought the tenant had been placed under guardianship as a spendthrift by order of the probate court. It appeared by the officer's return on the writ that both the tenant and his guardian were summoned to appear and answer. And two attorneys of this court entered a general appearance for the tenant.

B. F. Butler, for the tenant.

E. A. Kelly, for the demandant.

MERRICK, J. The first objection urged by the tenant against the maintenance of this action certainly cannot avail him. As against him the title acquired by the demandant under the mortgage deed made to Wright by Justus L. Whitcomb is, to the extent of the lien upon the estate thereby created, perfectly good. It is of no consequence in relation to this question whether the title by the mortgage was merged in that acquired by the demandant by the deed of Justus L. Whitcomb to himself. The deed of Justus L. Whitcomb to the demandant, having been made before the tenant's levy of execution, was an effectual conveyance of all the estate which remained in the mortgagor, except that which had before been given and granted by the mortgage, and made a perfect title in the demandant and entitled him to recover.

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It is undoubtedly true that after a proper judicial decree that the tenant was a spendthrift, and the consequent appointment of a guardian to take charge of his estate, his guardian should be made a party to all proceedings against him in a court of law. Nor would a judgment otherwise rendered against him in any suit whatever be held to be legal and obligatory. But in the present instance, though no formal summons was issued to the guardian of Jacobs, the writ was in fact served upon him, and it was his duty to take charge of the defence, and protect his ward from the effect of it, if there was any just or legal way in which it could be done. We cannot presume that he was ignorant of his duty, or that he neglected to perform it. It is shown that two attorneys of this court were in fact employed as counsel for the tenant, and that they appeared generally for him in this action, and pleaded nul disseisin. The guardian is the only person who could have legally employed them or authorized them to appear and set up any defence. In the absence of any proof that they did this without proper authority and against the rights of the parties, it is certainly to be presumed that they appeared in court and entered their names as counsel for the tenant and filed the plea in his behalf at the request and as the agents of the guardian. This being taken to be the true conclusion from the facts shown in evidence, then it follows that the usual and ordinary effect is to be given to the plea of nul disseisin, namely, that the tenant entered upon and ousted the demandant from the premises.

The demandant therefore, having shown a complete title to the premises in himself and his ouster therefrom by the tenant, is entitled to maintain an action to recover the possession thereof against the tenant. *Tenant defaulted.*

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JOHN PATTERSON *vs.* BENJAMIN GOLDSMITH.

In an action on a recognizance to prosecute an appeal it must be alleged and proved that the recognizance was returned into the court appealed to.

ACTION OF CONTRACT, commenced before a justice of the peace, upon a recognizance in the sum of eighty dollars, entered into by the defendant before a justice of the peace, and conditioned that the defendant in a personal action should prosecute with effect at the court of common pleas an appeal from the judgment of said justice therein.

The declaration alleged that said defendant in that action appealed to the court of common pleas, and recognized, with the present defendant as his surety, to prosecute said appeal with effect, as appeared by the recognizance, (a copy of which was annexed to the declaration,) and that in the court of common pleas the plaintiff recovered judgment, which was in full force.

In this action upon the recognizance the defendant was defaulted, and appealed to the court of common pleas, and there filed an answer, which averred "that the magistrate before whom said action was returned had no jurisdiction of the same, and that this court have no appellate jurisdiction thereof," "because it does not appear by the plaintiff's declaration, that said recognizance had been entered of record in the said court of common pleas or has been transmitted to said court according to law."

The record of the court of common pleas, after setting forth the pleadings, concluded by stating that "the court, having heard the parties, and maturely deliberated in the premises, order judgment for the defendant;" that judgment was ordered accordingly; and that the plaintiff appealed to this court.

A. V. Lynde, for the plaintiff, cited Rev. Sts. *c.* 85, § 15; *Commonwealth* v. *McNeil*, 19 Pick. 138; *Benedict* v. *Cutting*, 13 Met. 186.

J. M. Randall, for the defendant.

METCALF, J. The declaration is bad, for not averring that the

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recognizance was returned to the court of common pleas; without proof of that fact the plaintiff could not recover. *Turbell* v. *Gray*, 4 Gray, 445, & cases cited. *Bowler* v. *Palmer*, 4 Gray, 445, note. This objection, as the cases just cited show, should regularly have been taken by demurrer. But, as it appears by the record that the case was submitted to the decision of the court below, without averment or proof of this material fact, the judgment for the defendant must be affirmed.

Judgment for the defendant.

COMMONWEALTH *vs.* PATRICK KELLY.

A bond given by a person convicted under a statute which requires him to give bond not to violate any law "concerning the sale of intoxicating liquors," is void if conditioned that he shall not violate any law "concerning the manufacture or sale of intoxicating liquors."

ACTION OF CONTRACT upon a bond, which recited the conviction of the defendant in the court of common pleas for this county, "of having sold a certain quantity of spirituous and intoxicating liquors to one James S. Bamford, contrary to the provisions of an act concerning the manufacture and sale of spirituous or intoxicating liquors, passed May 22d A. D. 1852;" and conditioned that the defendant should "not within one year from the date of the aforesaid conviction violate any law of the Commonwealth concerning the manufacture or sale of spirituous or intoxicating liquors."

The defendant demurred to the declaration, upon various grounds, one of which is stated in the opinion.

D. S. Richardson, for the defendant.

I. S. Morse, (District Attorney,) for the Commonwealth, cited *Bartlett* v. *Willis*, 3 Mass. 86; *Burroughs* v. *Lowder*, 8 Mass. 373; *Sweetser* v. *Hay*, 2 Gray, 49.

MERRICK, J. The defendant insists that the bond declared on is void, because by the terms of its condition the penalty was to

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be forfeited if the obligor should, within the time limited therein, violate any law of the Commonwealth concerning the manufacture or sale of spirituous or intoxicating liquors. And he assigns this as one of several causes of demurrer to the declaration.

Upon inspection of the record, it appears that the bond was given under an order of the court of common pleas while he stood convicted therein upon a charge of having unlawfully sold a certain quantity of spirituous and intoxicating liquor to James S. Bamford. The statute relating to this subject provides that if any person shall sell any spirituous or intoxicating liquor in violation of its provisions, he shall upon the first conviction thereof pay a fine of ten dollars and the costs of prosecution, "and shall be required to give bonds in a sum of not less than one thousand dollars, that he will not within one year from such conviction violate any law of the Commonwealth concerning the sale of spirituous or intoxicating liquors." *St.* 1852, *c.* 322, § 7. These provisions clearly define the power and duty of the court, and determine the liabilities of a party who is arraigned for their violation. The prescribed fine is to be imposed and the designated bond to be required. But nothing further can be legally exacted from him, nor can he rightfully be subjected to any other punishment than that which is expressly authorized by the statute.

The question then is whether the bond taken from the defendant was of such a character as the court had authority to require from him; and it is apparent from an examination of the terms of its condition that it was not. The statute does not empower the court to add to the fine of a party, who has been thus duly convicted of an unlawful sale of spirituous or intoxicating liquor, a requisition that he shall enter into an obligation, under a fixed penalty, that he will not during the then next ensuing year violate any law of the Commonwealth concerning the manufacture of those commodities. The unlawful manufacture of spirituous and intoxicating liquors is a thing altogether different from their unlawful sale; and the distinction is recognized and provided for by the statute. Each of them is

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prohibited under pains and penalties specially prescribed, and applicable to the several offences. *St.* 1852, *c.* 322, §§ 7, 12. According to the condition of the bond given by the defendant the penalty was to be forfeited if, within the fixed period of the year ensuing next after his conviction of an unlawful sale, he should be guilty of violating any law of the Commonwealth concerning either the sale or the manufacture of any of this species of property. Such a bond might have been required if the defendant had been convicted under the 12th section of the statute upon a charge of having manufactured for sale spirituous or intoxicating liquors contrary to its provisions. But that was not the position in which he was placed. He had been found guilty only of an unlawful sale. Clearly therefore there had been no such conviction as authorized the court to require from him the obligation which he was made to assume. The bond was made payable directly to the Commonwealth; but it must necessarily have been taken by some one of its officers. Yet no one had a right to demand it of him. It was thus taken without authority; and having been exacted of him against his rights, and in absence of any legal justification therefor, the act of taking it was illegal and the contract is void. See *Boston* v. *Capen*, 7 Cush. 116, and cases there cited.

It was suggested in the argument in behalf of the Commonwealth, that this action could be maintained upon the ground that the obligation in the bond was voluntarily assumed by the defendant. But there are no facts upon which this suggestion can rest. On the contrary, it distinctly appears from the recitals in the contract that it was executed while the defendant was before the court, complying with the sentence which had been awarded against him. He was either in actual custody, or under recognizance binding him to abide the order and judgment of the court. For aught therefore that appears, he had no other alternative than to execute the bond, or yield himself a prisoner and submit to actual imprisonment. Under such circumstances the bond must be deemed to have been executed under coercion; and therefore he has a clear right to insist upon its invalidity. *Demurrer sustained; judgment for the defendant.*

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Commonwealth *vs.* William Hall.

A precept from the governor of a state, appointing an agent to receive a fugitive from justice, which recites that he has made a requisition, agreeably to the Constitution and laws of the United States, upon the governor of the state into which the fugitive was alleged to have escaped, is *prima facie* evidence, for the protection of the agent, of the truth of the recitals.

A warrant issued by the governor of this commonwealth, authorizing the agent of another state to "take and receive into custody" a fugitive from justice, authorizes him to arrest such fugitive; and is not repugnant to the Constitution and laws of this state or of the United States.

The provisions of the Rev. Sts. *c.* 142, § 7, authorizing the governor alone to issue his warrant for the apprehension of a fugitive from justice, are not repugnant to the U. S. St. of 1793, directing the demand and surrender of such fugitives to be made by "the executive authority" of a state.

Upon a requisition from the governor of another state for the surrender of a fugitive from justice, the governor of this commonwealth issued a warrant for his arrest to an agent of that state, and a similar warrant to a sheriff and his deputies. *Held*, that an arrest by a deputy sheriff under the second warrant, and a discharge of the alleged fugitive on bail on a writ of habeas corpus, did not prevent an arrest by the agent of the other state under the first warrant.

Indictment for an unauthorized attempt to forcibly and secretly seize, take, confine, kidnap and imprison Jonas Wyeth, Jr., with intent to send and convey him out of the Commonwealth by force and against his will, in violation of the Rev. Sts. *c.* 125, § 20.

At the trial in the court of common pleas, the district attorney introduced evidence that Wyeth, having been arrested by Richardson, a deputy sheriff of this county, and sued out a writ of habeas corpus returnable before this court, and pending the proceedings thereon been admitted to bail, was then taken by the defendant, which was the act complained of.

The defendant did not deny that he attempted to take Wyeth and convey him out of the Commonwealth, but justified under the following processes:

1st. A warrant, dated June 4th 1856, from the Governor of Iowa to the defendant, the important part of which was as follows: "Whereas Jonas Wyeth stands charged with committing the crime of bigamy in Scott County in said state; and it has been represented to me that he has fled from the justice of this

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State of Iowa, and taken refuge within the State of Massachusetts; and whereas, agreeably to the provisions of the Constitution of the United States and an act of congress passed the twelfth day of February one thousand seven hundred and ninety three, I have made application to his excellency the Governor of Massachusetts for the delivery of said Jonas Wyeth as fugitive from justice; and have also in pursuance of the power vested in me by law appointed, and by these presents I do appoint and commission William Hall an agent, on the part of this state, for the purpose of bringing the said Jonas Wyeth into this state having jurisdiction of said crime aforesaid, whenever the governor of the said State of Massachusetts shall cause him to be delivered up agreeably to the requisition aforesaid. Then and therefore to request and require all persons to permit the said William Hall to receive and secure the said Jonas Wyeth and bring him unmolested into this state, having jurisdiction of his crime, the said agent peaceably and lawfully behaving."

2d. A warrant to the defendant, dated June 16th 1856, from the Governor of Massachusetts, reciting the requisition of the Governor of Iowa upon him, and proceeding as follows: "And whereas it appears, from documents exhibited to me, that you the said William Hall have been duly appointed by the supreme executive authority of Iowa to receive the said fugitive from the authority of this commonwealth, and him to transport and convey to the said State of Iowa; I do hereby, by virtue of the provisions of the Constitution and laws of the United States, and the laws of this commonwealth, authorize you the said William Hall to take and receive the said Jonas Wyeth into your custody, and him to convey and transport to the line of this commonwealth, there to be dealt with as to law and justice may appertain. And our civil officers are required to afford you all needed assistance in obtaining and preserving the custody of said Jonas Wyeth until he shall be transported to the limits of the Commonweath of Massachusetts, all of which is to be without charge or expense to the said commonwealth."

It further appeared that the defendant received from the Gov-

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ernor of Massachusetts, together with the last warrant, a process addressed to the sheriff of this county and his deputies, in which the governor recited the requisition of the Governor of Iowa, and his own warrant, and required said sheriff and his deputies and all civil officers within the Commonwealth to afford all needful assistance in the execution thereof; and which was delivered by the defendant to Richardson, who thereupon by the defendant's request arrested Wyeth thereon, but never delivered him to the defendant, in consequence of the proceedings on the *habeas corpus*.

Sanger, J. instructed the jury "that the defendant, under the requisition from the governor of Iowa, and as agent under such requisition, had no authority to arrest Wyeth, but that he must apply to the executive of Massachusetts; that on said application it was the duty of said executive, if a proper case was made out, to cause the arrest of Wyeth, and have him delivered to said agent; and that the warrant issued as aforesaid to the defendant, in connection with the warrant delivered to him addressed to the sheriff of Middlesex and by the defendant given to Richardson as aforesaid, did not authorize the defendant himself to arrest Wyeth, but only to receive him and carry him to the line of the State."

The jury found the defendant guilty, and he alleged exceptions, which were argued on the 9th of February 1858.

C. Cushing & S. Webster, for the defendant.

S. H. Phillips, (Attorney General,*) for the Commonwealth. The extradition of fugitives from justice, as between independent nations, rests wholly upon treaties. By the Constitution of the United States, the states have surrendered to the general government all power over the subject, both as between themselves, and as respects foreign governments; and are expressly prohibited from making treaties. *Holmes* v. *Jennison*, 14 Pet. 570–580. *In re Kaine*, 14 How. 110. U. S. Constitution, art. 1, § 10. The provision of the Constitution for the

* Elected in November 1857, under the seventeenth article of amendments of the Constitution, and entered upon his office in January 1858.

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surrender of fugitives from justice, escaping from one state into another, cannot be executed without the aid of legislation; and congress having legislated on the subject, it seems that the states may still pass statutes to assist the operation of the acts of congress. *Commonwealth* v. *Tracy*, 5 Met. 548. *In re Metzger*, 1 Barb. 256. *Prigg* v. *Pennsylvania*, 16 Pet. 639. *Moore* v. *Illinois*, 14 How. 22.

The acts of the defendant constitute the offence charged, unless he was justified by the requisition of the governor of Iowa and the warrant of the governor of Massachusetts. And his justification fails.

1. Because the requisition of the governor of Iowa was not accompanied by a certified copy of an indictment found, or an affidavit, as required by the act of congress of 1793, *c.* 45; and because the warrant from the governor of Massachusetts does not recite that the requisition of the governor of Iowa was accompanied by the required evidence. 1 U. S. Sts. at Large, 302. *Ex parte Smith*, 3 McLean, 121. *In re Clark*, 9 Wend. 212. *Ex parte Thornton*, 9 Tex. 635. *British Prisoners*, 1 Woodb. & Min. 69. Declaration of Rights, art. 14.

2. Because the warrant from the governor of Massachusetts to the defendant did not authorize the arrest. The Constitution of the United States and the act of 1793 contemplate an arrest by the authorities of the state in which the fugitive is found, and a subsequent delivery to the agent of the State making the requisition; and to construe the word "take" in Rev. Sts. *c.* 142, § 7, as synonymous with "arrest," would be also repugnant to the Constitution of Massachusetts, which provides for the election of officers qualified to make arrests. Const. Mass. amendments, art. 19. The governor cannot give such power to the agent of another state.

3. Because this warrant was issued by the governor of this commonwealth alone, and not by the governor with the advice and consent of the council. The Constitution and laws of the United States vest the power of demanding and surrendering fugitives in the executive authority of the state, but by the Constitution of Massachusetts the executive authority for all civil

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purposes is vested in the governor and council; and no power other than legislative or military is vested in the governor alone, except the necessary power of assembling the council. Constitution of Mass. *c.* 2, § 4. The *St.* of 1801, *c.* 10, of which § 7 of the Rev. Sts. *c.* 142 is substantially a reënactment, provided that the warrant to the foreign agent should be issued by the governor with the advice of the council; and so the law stood till *St.* 1819, *c.* 76. Considering the inconvenience of this requirement in a case demanding often so speedy action (which inconvenience probably led to its repeal in 1819) this statute must be regarded as a contemporary interpretation of these words "executive authority," entitled to great consideration.

4. A person arrested under an executive warrant as a fugitive from justice is entitled by *habeas corpus* to try the legality of his arrest. *Ex parte Smith*, 3 McLean, 121. *British Prisoners*, 1 Woodb. & Min. 66. It was a contempt of this court to seize Wyeth, while on bail pending the proceedings on the *habeas corpus*, with intent to carry him out of the jurisdiction of the court. 4 Bl. Com. 285. If the defendant's acts were a contempt, they were unlawful, and an unlawful act cannot be a valid execution of process.

Bigelow, J. The several objections made by the attorney general to the justification relied on by the defendant seem to us to be untenable.

1. The precepts issued by the governor of the State of Iowa and by the governor of this commonwealth are in conformity with the act of congress of February 12th 1793, *c.* 45, § 1, and the provisions of the Rev. Sts. *c.* 142, § 7. By the recital in the former it appears that the requisition on the governor of this state was made in strict conformity with the act of congress. Being an official precept, issued with all the formalities required by law and regular on its face, all its recitals are in the absence of controlling proof to be taken as true. It is not therefore open to the government to object that the requisition on the governor of this state was not accompanied by a certified copy of an indictment found on an affidavit as required by the U. S. St. of 1793, § 1. The precept produced by the defendant

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was *prima facie* evidence, at least, that all necessary legal prerequisites had been complied with, and he was entitled to the benefit of the maxim, *omnia rite acta presumuntur*.

2. The warrant in express terms authorized the defendant to "take" the fugitive as well as to "receive, convey and transport him to the line of the Commonwealth." The word "take" in the sense in which it is used in this precept is synonymous with "arrest." It is the technical word used in all writs and precepts by which a sheriff or other officer is commanded to arrest the body, and in this sense it is frequently used in the statutes of this commonwealth. Rev. Sts. *c.* 90, § 3; *c.* 111, § 5; *c.* 135, § 2. In the same sense it is manifestly used in the Rev. Sts. *c.* 142, § 7, under which the precept in the present case was issued to the defendant. Nor is there anything in the Constitution or laws of this commonwealth to restrain the power of the governor in giving this authority to the defendant. On the contrary, he is expressly authorized by the Rev. Sts. *c.* 142, § 7, to issue his warrant authorizing the agent of the State that makes the demand to arrest the fugitive. By the U. S. St. of 1793, he is also empowered to cause the arrest to be made. So that in issuing his precept to the defendant for the arrest of the fugitive, the governor of this commonwealth acted in conformity to the laws both of this state and of the United States.

3. It is objected, however, that the governor had no authority to issue the warrant to the defendant without the advice and consent of the council. This objection is founded on the phraseology of the U. S. St. of 1793, which authorizes the "executive authority" of a state to demand the surrender of fugitives from justice and to arrest and deliver them up. The argument is that under the Constitution of this commonwealth the executive authority is not vested in the governor alone, but in the governor aided by the advice and consent of the council. But we think this is founded on too narrow an interpretation of the act of congress. By the term "executive authority" as there used, nothing more was intended than to prescribe the department of the government to which application should be made for the surrender of fugitives from justice. It was the execu-

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tive authority, as distinguished from the judicial and legislative branches of the government, that was to exercise the power and authority conferred by the act. But it was not intended that every member of that department should be called into action for the purpose; but only so much thereof as should be necessary to carry its provisions into effect. The provision of the Rev. Sts. *c.* 142, § 7, authorizing the governor to issue his warrant for the apprehension of the fugitive, was therefore in accordance with the act of congress; and being intended to aid in the enforcement of that law, and not being repugnant to any provision in the State Constitution, it is not open to the objection urged by the prosecution. *Commonwealth* v. *Tracy*, 5 Met. 548.

4. The writ of *habeas corpus* in no way affected the validity of the precept under which the defendant arrested Wyeth. It was wholly a collateral and independent proceeding, and did not necessarily involve the question of the validity of the extradition of the alleged fugitive, nor would his discharge from custody on the precept held by the deputy sheriff have absolved him from arrest on that held by the defendant. The latter might well be a valid subsisting warrant, although the former had been adjudged informal and void. *Exceptions sustained.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF BRISTOL, PLYMOUTH, BARNSTABLE AND DUKES COUNTY, OCTOBER TERM 1857, AT PLYMOUTH.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. BENJAMIN F. THOMAS,
} JUSTICES.

CHARLES PHINNEY *vs.* WILLIAM WATTS.

A deed of land bounded "westerly by P.'s Mill Pond," which has been artificially created by erecting a dam across a stream, and through which the thread of the stream has always been apparent, passes the land to the thread of the stream.

ACTION OF TORT for breaking the plaintiff's close and taking fish therein. The parties submitted to the judgment of the court this case:

In 1822 Josiah Scudder conveyed to the plaintiff a tract of land in Barnstable bounded "westerly by Phinney's Mill Pond." This mill pond was about thirty rods long and from one to six rods wide, and, long before this conveyance, had been made by building a dam across a natural stream. It was sometimes called "Phinney's Mill Pond," and sometimes "Trout Brook."

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and through the middle of the pond the thread of the stream is and always has been apparent from the greater depth of water and the current.

The defendant, under license from an owner of the dam and the water privilege incident thereto, crossed the pond in a boat, and between the thread of the stream and the plaintiff's upland caught a pound of trout.

J. M. Day, for the plaintiff, cited *Waterman* v. *Johnson*, 13 Pick. 261; *Bradley* v. *Rice*, 13 Maine, 198; *Hathorne* v. *Stinson*, 3 Fairf. 183; *Nickerson* v. *Crawford*, 16 Maine, 245; *Lowell* v. *Robinson*, 16 Maine, 357.

G. Marston, for the defendant, relied on *Waterman* v. *Johnson*, 13 Pick. 261.

Metcalf, J. By the deed under which the plaintiff claims title to the *locus in quo*, he is bounded "westerly by Phinney's Mill Pond," which, according to the agreed facts, is sometimes called by that name, and sometimes by the name of "Trout Brook," and which is about thirty rods long, and from one to six rods wide, and through which the thread of a stream has always been apparent. On this state of the facts, the court are of opinion that the western boundary of the plaintiff's land is the centre or thread of the stream; as it unquestionably would have been, if the deed had bounded him on Trout Brook, the other name by which the water was known and called.

Though we cannot see any reason why the plaintiff's grantor should wish to exclude from his grant the very narrow strip of land between the brook and the edge of the water overflowing its banks — which would be worthless to him, while overflowed — yet this cannot be allowed to influence our judgment. The deed must be construed by the legal rules which are applicable to its terms.

However the words "bounded by a pond" should be construed, when applied to a natural pond, whether in its original state or raised by artificial means, we are of opinion, with Chief Justice Weston, that when land is bounded "upon an artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This

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is law," he says, "well settled and understood." *Bradley* v. *Rice*, 13 Maine, 201. See also *Waterman* v. *Johnson*, 13 Pick. 265, where Chief Justice Shaw intimates the like opinion; also *Lowell* v. *Robinson*, 16 Maine, 361. In the absence of any adjudication conclusively settling the precise case before us, we adopt these views and apply them.

Judgment for the plaintiff.

NATHAN M. HATCH *vs.* ELIJAH W. CARPENTER.

The rejection of secondary evidence after the introduction of sufficient preliminary evidence to warrant its admission may be revised on exceptions in which all the evidence is reported.

The following testimony of an attorney was held sufficient to warrant the introduction of secondary evidence of the contents of a letter sent to him by his client in a previous case: "I do not know where that letter is. I have searched twice during the past week for it among my papers at my office and other places where I keep my papers, but have not been able to find it. My impression is that the letter lay upon my table till after I had seen the plaintiff at that trial, and then went into the waste basket." On cross-examination, he testified: "I did not look through all my files of letters and papers, for when I came across a file marked as of a previous year, I did not search through it; I did not examine the papers I looked over one by one, and there were places containing papers (but not private papers) that I did not examine."

ACTION OF CONTRACT to recover for services as constable, witness and otherwise in a suit brought by Phipps against the town of Chatham. To prove that Phipps had written a letter to Carpenter requesting him to see an attorney at law, and ask him to commence that suit, the plaintiff called the attorney, (who was also judge of probate,) who testified as follows:

"A short time before I brought the action of Phipps *vs.* Chatham, I received a letter from Carpenter inclosing one from Phipps to him. I do not know where that letter (from Phipps to Carpenter) is. I have searched twice during the past week for the letter among my papers at my office and other places where I keep my papers, but have not been able to find it. My impression is that the letter lay upon my table till after I had

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seen Phipps at the trial, and that it then went into the waste basket." Upon cross-examination the witness testified: "I have searched for the letter at my office, at my house and at several places in the probate office (naming them). I did not look through all my files of letters and papers, for when I came across a file marked as of a previous year, I did not search through it. I did not examine the papers I looked over, one by one, and there were places containing papers, (but not private papers,) that I did not examine."

The defendant then offered to prove by other evidence the contents of the letter. But *Sanger*, J. refused to permit him so to do, and ruled "that there was not sufficient evidence of a loss or destruction of the letter to let in secondary evidence of its contents." The jury returned a verdict for the plaintiff, and the defendant excepted.

S. N. Small, for the defendant. 1. The ruling of the presiding judge upon the question whether the proof of the loss of the paper was sufficient to warrant the introduction of secondary evidence was a proper subject of exception. *Foster* v. *Mackay*, 7 Met. 531.

2. The defendant should have been required to establish a reasonable presumption only of the loss of the letter to enable him to put in secondary evidence of its contents; and for this purpose proof that a *bona fide* and diligent search had been unsuccessfully made for it, in the places where it was most likely to be found, was sufficient. The fact that the paper was of little value increases the presumption of loss. And testimony that it was thrown aside as useless, and is believed by the witness to have been lost or destroyed, is sufficient to let in secondary evidence of its contents. 1 Greenl. Ev. § 538. 2 Phil. Ev. (6th Amer. ed.) 230, 234, and Cowen & Hill's notes. *Jones* v. *Fales*, 5 Mass. 101. *Betts* v. *Jackson*, 6 Wend. 181. *The King* v. *Johnson*, 7 East, 65. *Bank of United States* v. *Sill*, 5 Conn. 111. *Riggs* v. *Taylor*, 9 Wheat. 484.

J. M. Day, for the plaintiff. 1. The question whether the loss of the instrument was sufficiently proved to justify the admission of secondary evidence was addressed to the discretion of

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the presiding judge, and not a subject of exception. *Page* v. *Page*, 15 Pick. 368. *Taunton Bank* v. *Richardson*, 5 Pick. 436. *Donelson* v. *Taylor*, 8 Pick. 390. 1 Greenl. Ev. § 558. *Reynard* v. *Brecknell*, 4 Pick. 302. *Whitney* v. *Thayer*, 5 Pick 528. *Gray* v. *Bridge*, 11 Pick. 189.

2. The ruling was right. The party offering secondary proof must first prove the existence of the paper and its loss. Here was no sufficient evidence, because the defendant did not make oath to the loss of the paper or that it was not in his possession. 1 Greenl. Ev. §§ 349, 558. Nor was there any sufficient search made by the witness. He was bound to exhaust in a reasonable degree all sources of information and means of discovery. 1 Greenl. Ev. § 558 His testimony shows that many of his files of papers were not examined at all, and that those which he did examine were not examined carefully. And he did not testify to any knowledge that the paper was lost.

Shaw, C. J. Without giving any definite opinion upon the question whether the amount of evidence required to warrant the admission of secondary evidence is a matter upon which exceptions may be claimed as of right to the rulings of the judge presiding at the trial, we must suppose that in this case the judge, by allowing a bill of exceptions which stated the testimony in detail, intended to submit to this court the question of law, arising thereon, of the sufficiency of the testimony introduced to warrant the introduction of secondary evidence.

The proof is clear of the former existence of the letter. What shall be considered sufficient diligence or sufficient thoroughness of search must depend on the nature of the paper and the circumstances of the case. The affidavit of the party is only necessary when from the nature of the paper it would be in his possession or is traced to him. But this was a letter addressed to the attorney, which had become unimportant to the party, and the custody of which would naturally be with the attorney. It was not a paper which would be kept with the care of an important deed or instrument. The search, as testified to by the attorney, appears to have been made in good faith and with sufficient diligence.

It has been said that the witness should testify to his knowl-

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edge that the paper is lost, and not merely to his belief. But the difference is, after all, nothing more than in the degree of certainty. With regard to things which make not a very deep impression on the memory, it may be called "belief." "Knowledge" is nothing more than a man's firm belief. The difference is ordinarily merely in the degree; to be judged of by the court. when addressed to the court; by the jury, when addressed to the jury. *Exceptions sustained.*

LEVI CROWELL *vs.* ELISHA BROWN & another.

B. agreed in writing to build and deliver a vessel for a certain sum, to be paid in two instalments, one when the vessel should be in frame, and the other on the delivery of the vessel complete. After the vessel was in frame C. refused to pay the first instalment unless B. would give him security for the completion and delivery of the vessel; and B. thereupon gave him a bond, reciting the written agreement, and conditioned that B. should, within a reasonable time after the time named in the agreement, finish and deliver the vessel, and, upon C.'s payment, within ten days after such delivery, of the balance of the sum stipulated in the agreement, execute a conveyance of the vessel to him. *Held*, that B.'s subsequent failure to deliver the vessel according to the bond was a breach thereof, on which C. might sue without having paid the first instalment.

ACTION OF CONTRACT upon a bond executed on the 4th of June 1855, with this condition: "Whereas on or about the first day of January last past the said Elisha Brown entered into a certain agreement in writing, by the terms of which said Brown agrees to build a schooner duly described in said writing, and have the same completed on or about the first day of August next; and in and by said agreement said Levi Crowell was and is to make certain payments towards said schooner in advance before the said vessel is completed. Now if said Brown shall within a reasonable time after the time named in said agreement in writing for the same have said schooner done accoording to the terms of said agreement and delivered in Boston; and said Crowell shall within ten days after he has notice of such delivery in Boston pay the balance not before paid by him of the sum named in said agreement to be by him paid; and said Brown shall upon such payments execute and deliver to said

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Crowell such conveyances and transfers of such schooner as shall constitute said Crowell and the persons whom he may name full and perfect owners of an unincumbered title to three quarters of said schooner; then these presents shall be void; otherwise, to remain in full force."

By the agreement referred to in the bond, Brown agreed to finish the schooner and deliver her to Crowell at Boston by the 1st of August 1855, "for the sum of thirteen thousand, four hundred and thirty dollars, to be paid as follows: Five thousand dollars when the vessel is in frame; and the balance on the delivery of the vessel at Boston complete, agreeably to the foregoing contract."

The defendant admitted the execution of the bond; but contended that the plaintiff could not maintain his action, because he had not paid the first instalment of $5000, mentioned in the agreement. And the parties submitted the case to the decision of the court upon the following statement of facts:

"A few days before the date of the bond the vessel was fully in frame according to the terms of the contract, and five thousand dollars due thereby from the plaintiff to Brown. The plaintiff refused to make the payment unless Brown would furnish security that the vessel should be completed and delivered according to the terms of his contract. Thereupon the bond was executed and delivered. After the delivery of the bond the plaintiff made part payment of the five thousand dollars, and by the early part of August had paid $4503.50. But he refused to complete the payment, on the ground that there were liens and incumbrances on the vessel, and he feared that Brown would not be able to give him a good title thereto. In September 1855 Brown mortgaged the vessel to one Glover for three thousand dollars, and in October 1855 gave the plaintiff a mortgage upon her for the amount of his advances. The vessel was completed, but Brown was unable to discharge the liens of mechanics and material men upon the vessel, and she was sold by order of court to satisfy those claims, and Brown has never delivered or offered to deliver the vessel to the plaintiff, nor has he been able to make a clear title to her."

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I. W. Beard, for the plaintiff.

G. Marston, for the defendants.

THOMAS, J. The question is as to the breach of the bond. That the vessel was not completed and delivered to the plaintiff according to the bond is agreed. The object of the bond is plain, security for the delivery of the vessel and for the advances made upon her. The defendant says, there was no breach, because the five thousand dollars to be paid by the agreement for the construction of the vessel when it was in frame was not paid. As the bond was not given until after the vessel was in frame and the five thousand dollars had become due, this construction would render performance on the part of the plaintiff impossible, and so the bond void from inception. Such construction clearly defeats the purposes of the contract.

Judgment for the plaintiff.

ISAAC EWER *vs.* GEORGE LOVELL.

Cutting timber for fences by one tenant in common, from time to time for more than twenty years, in a cedar swamp surrounded by cultivated lands, is no disseisin of his cotenant.

WRIT OF ENTRY, dated April 16th 1856, to recover an undivided half of a piece of cedar swamp in Barnstable. Plea, nul disseisin.

At the trial, the demandant proved by record a division of the entire swamp, called the Round Swamp, in 1792, part to the heirs of Jacob Lovell in common, and the residue to certain other persons, and the vesting of the title of some of Jacob Lovell's heirs in the demandant, and of Lovell's other heirs and said other persons in the tenant.

The tenant relied upon a title by disseisin, and offered evidence that he and those under whom he claimed title had since 1821, from time to time, but not every year, cut cedar in the swamp, wherever it was fit for cutting, making no distinction

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between the part held by them in severalty, and the part held in common with those having the demandant's title; that the demandant never interfered with such cutting, and it did not appear that it was known to him, until 1848, when he asserted his title. The tenant also offered evidence to show that the land around the swamp on all sides was open and cleared, down to the swamp, and had been cultivated as parts of farms, or pastured, for more than fifty years; but none of this upland was owned by the demandant, and only a piece on the northern side by the tenant. It was also in evidence that the swamp was situated at one end of the village of Osterville, not far from the highway, and near dwellings, some of which had been there for forty years and more, though it was testified that a person might be cutting cedar in the swamp and another passing in the highway not be likely to see the act.

Dewey, J. proposed to instruct the jury "that the acts of the tenant and those under whom he claimed were not sufficient to establish a disseisin twenty years before the commencement of this action in such land as the demanded premises, especially as the tenant or those privy to his estate were cotenants with the demandant and those from whom he derived his title." A verdict was thereupon taken for the demandant, and the case reported, at the request of the tenant, for the opinion of the whole court.

G. Marston, for the demandant, cited *Slater* v. *Jepherson*, 6 Cush. 129; *Cook* v. *Babcock*, 11 Cush. 206.

B. F. Hallett, for the tenant, cited *Kennebeck Purchase* v. *Springer*, 4 Mass. 146; *Coburn* v. *Hollis*, 3 Met. 125; *Allen* v. *Holton*, 20 Pick. 458; *Drake* v. *Curtis*, 1 Cush. 395; *Small* v. *Procter*, 15 Mass. 495; *Prescott* v. *Nevers*, 4 Mason, 326; *Sumner* v. *Stevens*, 6 Met. 337; *Brimmer* v. *Long Wharf*, 5 Pick. 134; *Boston Mill Corporation* v. *Bulfinch*, 6 Mass. 229; *Baker* v. *Salmon*, 2 Met. 32; *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15; *Poignard* v. *Smith*, 6 Pick. 172; *Parker* v. *Proprietors of Locks & Canals*, 3 Met. 91; *Blood* v. *Wood*, 1 Met. 528.

Thomas, J. This under our law of disseisin is a plain case. The demandant showed a good record title. The records also

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show that the tenant in this action was tenant in common of the land with the demandant. The tenant attempted to show a title by disseisin. The land was a cedar swamp, near to a village, surrounded by cultivated lands. The evidence of disseisin was the cutting by the tenant from time to time of cedar for fences. The cutting was not every year, nor was the cutting brought home to the knowledge of the true owner. Here is no disseisin. *Judgment on the verdict.*

COMMONWEALTH *vs.* THOMAS ROGERS.

When a fine is imposed in the court of common pleas on appeal from a conviction before a justice of the peace for selling intoxicating liquors, the attorney's fee, allowed by *St.* 1855, *c.* 215, § 17, is to be paid to the attorney who appeared for the Commonwealth before the justice, and not to the district attorney.

It seems, that in such a prosecution commenced in the court of common pleas, the attorney's fee upon conviction is to be paid by the district attorney into the treasury of the Commonwealth.

COMPLAINT to a justice of the peace on *St.* 1855, *c.* 215, for an unlawful sale of intoxicating liquor. At the trial before the justice, C. I. Reed, Esq., an attorney of this court, appeared for the Commonwealth. The defendant was convicted, and appealed to the court of common pleas, where the district attorney appeared for the Commonwealth, and the defendant was again convicted and sentenced. The justice of the peace, in the bill of costs taxed by him, allowed Mr. Reed ten dollars as an attorney's fee. The district attorney, in taxing the bill of costs for payment by the county treasurer, struck out this allowance, and taxed and allowed such a fee to himself; and upon this taxation the two attorneys submitted the question to the decision of the court of common pleas, and, by appeal, to this court.

C. I. Reed, pro se.

L. F. Brigham, (District Attorney,) *pro se.*

J. H. Clifford, (Attorney General,) for the Commonwealth.

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DEWEY, J. In the case in which this question of taxing an attorney's fee arises, upon the trial before the justice of the peace, there was a conviction of the party charged, and agreeably to the provisions of the Rev. Sts. *c.* 141, § 2, the costs were taxed by the justice. The costs thus taxed included ten dollars for an attorney's fee in favor of Mr. Reed, who had appeared before the justice and discharged the duties of attorney in behalf of the Commonwealth, and claimed this allowance by virtue of the provisions of *St.* 1855, *c.* 215, § 15. The defendant in that prosecution appealed from the judgment of the justice to the court of common pleas, where he was again tried and convicted, and upon such conviction the district attorney insisted that the ten dollars allowed by the justice to Mr. Reed should be stricken out and an allowance of the like amount be made to the district attorney for his own use and benefit.

The *St.* of 1855, *c.* 215, § 15, contains the only provision under which this allowance can be claimed by either of these parties. It is not contended that this sum is to be taxed more than once, and the question is to which of these parties it is to be taxed.

It is urged on the part of the district attorney that the effect of the appeal was to vacate the judgment of the justice. This is true to a certain extent; and if on the trial in the court of common pleas the defendant had been acquitted, it would have been fatal to the claim of Mr. Reed for the attorney's fee, as such taxation is made dependent upon a conviction and the imposition of a fine; and in case of an appeal, such conviction and imposition of a fine could only be in the appellate court. *Commonwealth* v. *Bundy*, 5 Gray, 305. But to whom is it to be allowed in the case of a conviction before the justice on an appeal therefrom, followed by a conviction in the appellate court?

As it seems to us, the person who has appeared before the justice has the prior and better right. He is first in point of time, he has procured a conviction, and his costs have been duly taxed by the justice. The conviction on the appeal has fixed the liability of the defendant to pay such attorney's fee.

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As there is but one attorney's fee to be taxed, if the first taxation is a proper one, there should be no new or further taxation of the same.

As between these claimants, there are other considerations which, were it not for the broad language of the statute, apparently making a provision for such taxation of a ten dollars' attorney's fee in cases originating in the common pleas, as well as those instituted before a justice of the peace, would have led us to suppose that this allowance was limited exclusively to an attorney, who appeared before a justice of the peace. In cases pending before that tribunal the government has no officer to discharge the duties of prosecuting attorney, and it might be thought necessary to make some further provision to secure a proper and sufficient presentation of the case in behalf of the government, and to this end to provide a mode for the payment of such services.

But in reference to criminal trials in the higher tribunals, as well in cases originating there, as in those coming there by appeal from a justice, the Commonwealth have their legal representative in the person of one officially appointed, whose services are remunerated by an annual salary, and whose duties are by the Rev. Sts. *c.* 13, § 38, declared to embrace "all cases, criminal or civil," in which the Commonwealth is a party. The Rev. Sts. *c.* 13, § 43, fix the salaries of district attorneys as originally established, and declare them to be "in full for all services rendered by them." Section 45 requires that they shall "account with the treasurer of the Commonweath for all fees, bills of cost, and moneys received by them by virtue of their offices." Section 46 provides further that they shall not "receive any fee or reward from or in behalf of any prosecutor, for services in any prosecution or business to which it shall be their official duty to attend." See *Commonwealth* v. *Gibbs*, 4 Gray, 146.

We cannot suppose that the legislature could have intended, by the *St.* of 1855, *c.* 215, to change the character of those officers from salaried officers to persons to be paid by perquisites either in whole or in part. It is against the whole policy of the law in reference to such officers, as the same has been understood since

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their creation by the *St.* of 1832, *c.* 130. Their annual salaries have from time to time been enlarged as their labors have increased; but there has been, it is believed, no departure from this system of remuneration in relation to allowances to them for their ordinary duties in criminal cases. The only further allowance of any kind that has been made was that of thirty dollars allowed to the attorneys for the counties of Middlesex and Suffolk, for conducting proceedings against persons who should intrude beyond the line established and known as the commissioners' line, by the creation of wharves or other obstructions. Resolve of 1848, *c.* 76. Those were considered matters beyond the ordinary services of the district attorney.

Assuming that the language of the *St.* of 1855, *c.* 215, is broad enough to authorize, in cases where the prosecution originates in the court of common pleas, a taxation of an attorney's fee of ten dollars to the district attorney upon conviction of the party, such fee, in the opinion of the court, if paid, is to enure solely to the use of the Commonwealth, and if received by the district attorney, is to be accounted for with the Commonwealth. Rev. Sts. *c.* 13, § 45.

It is no sufficient answer to this, that by the terms of *St.* 1855, *c.* 215, § 15, there shall be paid ten dollars attorney's fee to the attorney who conducts the prosecution, to be taxed and allowed as a part of the costs, in each case where a fine is imposed under the statute. After the establishment of the salaries of district attorneys in 1832, certain fees, called attorney's fees, might still be taxed against persons who were convicted of offences and liable to a fine and costs, but when taxed they were either not drawn from the county treasury, or if taken were accounted for.

In the earlier *Sts.* of 1789, *c.* 45; 1800, *c.* 29, and 1813, *c.* 131, establishing salaries for the attorney general and solicitor general, though fees were still required to be taxed as against the parties convicted, as attorney fees, yet such fees were always required to be accounted for by those officers.

It would certainly be quite an anomaly for the Commonwealth to allow perquisites to a salaried officer for services clearly embraced, as these were, within the ordinary duties of

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the office. These precise duties were required by the laws before the *St.* of 1855, *c.* 215, and paid for by the annual salary.

Such perquisite would be objectionable as an offer of reward to a public officer for doing what his official duty alone required him to do. Such stimulants to the faithful discharge of duty have not received the countenance of this court, holding, as we have, that no police officer of Boston could be the recipient of a reward offered by the city to secure the arrest and conviction of persons charged with crime. *Mead* v. *Boston*, 3 Cush. 404.

An allowance of ten dollars to the district attorney in these cases is not merely obnoxious to the objection that it is a perquisite beyond his fixed salary, which he is allowed to receive from the person convicted; but it is really taking from the public treasury the sum of ten dollars for services which he was bound to perform by the general duties of his office, in every case of conviction where the defendant from poverty or other cause fails to pay fine and costs, and suffers the alternative of imprisonment; as the taxed costs are allowed and paid to the officers entitled to them, without any reference to their having been actually paid by those upon whom they were assessed.

In any view we take of the case, it seems to us that the district attorney has no personal interest in the taxation of an attorney's fee in those cases. In the present case, the attorney's fee was properly taxed originally in favor of Mr. Reed by the justice before whom a conviction was had. Upon the appeal, that conviction being confirmed, the allowance of an attorney's fee was thereby secured to the attorney who had appeared before the justice, and it was the only attorney's fee to be taxed. Had the case originated in the common pleas, the same might have been taxed as a fee of the district attorney, and, when drawn from the treasury, accounted for "as money received by virtue of his office."

No question was made by the parties as to the form in which this question was brought before us, and we have confined our attention exclusively to the construction of the statute.

Note. By *St.* 1859, *c.* 200, so much of *St.* 1855, *c.* 215, § 15, as provides for the taxation, allowance and payment of an attorney's fee, is repealed.

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Commonwealth *vs.* Joshua Dean.
Same v. Michael Hoye.

The requirement of the Rev. Sts. c. 135, § 2, that a warrant issued for the arrest of an accused person shall recite the substance of the accusation, is complied with by making the warrant on the same paper with the complaint, and definitely referring to it.

It seems, that an objection to the form of a warrant issued upon a complaint before a justice of the peace, though taken before the justice, is waived by not renewing it at the first opportunity in the court of common pleas on appeal.

Two complaints made, one by Peter C. Thayer, the other by John T. Carter, to a justice of the peace in Taunton, for single sales of intoxicating liquor in violation of St. 1855, c. 215, § 15. In each case the warrant upon which the defendant was arrested was upon the same paper with the original complaint.

In *Dean's case*, immediately following the complaint, the words of the warrant were as follows: "Bristol, ss. To the sheriff of said county, or his deputy, or to either of the constables of the town of Taunton in said county, greeting: Whereas the above complaint has this day been made on oath to the subscriber, a justice of the peace within and for said county, by the above named Thayer against the above named Dean, for the offence described in the annexed complaint." Then followed the order to apprehend the defendant and bring him before the justice, and to summon as a witness the person to whom liquor was alleged to have been sold.

Dean, before pleading to the complaint, moved that the complaint and warrant be quashed, and further proceedings be stayed, "because said warrant does not recite the substance of the accusation against the defendant, as is required by statute." The justice overruled the motion, and the defendant, being convicted, appealed to the court of common pleas, and, being again found guilty there, moved in arrest of judgment for the same reason. The court of common pleas overruled the motion, and the defendant appealed to this court.

In *Hoye's case*, the complaint and warrant were precisely like

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those against Dean, except in substituting, for the corresponding words in that warrant, the following words: "by the aboved named Carter against the aboved named Hoye." Hoye, before pleading to the complaint, moved to be discharged, because the warrant was insufficient, and this motion being overruled, and himself convicted, appealed to the court of common pleas, and there renewed his motion, and excepted to the decision of that court overruling it.

B. Sanford, for Dean. The Rev. Sts. *c.* 135, § 2, provide for a warrant separate and distinct from the complaint, and require it to recite "the substance of the accusation." And so is the form in D. Davis's Justice, 39, 202. This case is distinguishable from previous cases. The warrant held sufficient by a reference to the complaint, in *Commonwealth* v. *Dana*, 2 Met. 329, was a search warrant, issued under Rev. Sts. *c.* 142, § 3, which require only that the place and the articles to be seized "shall be designated and described in the warrant." *Donahoe* v. *Shed*, 8 Met. 326, was an action against the officer who served the warrant; and a process may well be sufficient to protect an officer acting under it, and yet insufficient to support an action or prosecution. *Brigham* v. *Este*, 2 Pick. 420. The failure of the warrant to conform with the requirements of the statute, having been seasonably objected to, was a fatal defect. *Commonwealth* v. *Henry*, 7 Cush. 512.

C. I. Reed, for Hoye.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Shaw, C. J. The statute requires that the warrant shall recite the substance of the accusation. Rev. Sts. *c.* 135, § 2. Although this, upon a strict and literal construction, would require the insertion of the substance of the complaint in the body of the warrant, still it is a rule, almost if not quite universal, that where a paper is annexed, and definitely referred to, it is to be treated as recited in and a part of the process or instrument in which it is recited. Each of these warrants definitely refers to the complaint on the same paper, by the words, "the above complaint," "the offence described in the annexed complaint," and also mentions the names of the complainant and defendant.

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The words "aboved named" in the warrant against Hoye—obviously mistakes of the pen or of the printer — may be rejected as merely senseless, and still leave enough to make a definite reference to the complaint.

If it were otherwise, the defect would be a mere informality or irregularity, an omission of a recital required for the defendant's benefit, and which was waived by a failure to take advantage of it at the earliest opportunity. The motion having been overruled in each case by the justice before whom the complaint was made, and the defendant thus obliged to proceed to trial, his pleading to the complaint there would not be a waiver of the objection. But he was bound to renew it before pleading in the court of common pleas. The objection is not therefore now open to the defendant in the first case. But we do not put it upon this ground; inasmuch as the answer already made is sufficient to dispose of both cases. *Exceptions overruled*

COMMONWEALTH *vs.* DANIEL LEONARD.

On the trial of a complaint charging an unlawful sale of intoxicating liquors in September, after the person to whom the sale was alleged to have been made had testified to one sale in August and others in September, the district attorney, against the defendant's objection, was allowed to withdraw all the evidence except of the sale in August, and the jury were instructed to consider only the evidence of that sale, and found the defendant guilty of a sale in August. *Held*, that the evidence so withdrawn might be introduced in support of a subsequent complaint for a sale in September, and if it proved, to the satisfaction of the jury, a sale other than that of which the defendant had been found guilty, would warrant a conviction.

COMPLAINT on St. 1855, *c.* 215, § 15, for an unlawful sale of intoxicating liquors on the 1st of September 1856 to Emory Morse. Trial in the court of common pleas before *Sanger*, J., who allowed this bill of exceptions:

"Previously to the trial of this complaint, another complaint, charging a single sale to said Morse on the third day of said September, was tried, on which the government called Morse,

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and him only, to prove that sale; and Morse testified, without objection on the part of the defendant, to several sales; one in August 1856, and the others in September and October 1856. When Morse had finished his testimony, the district attorney said he should claim a verdict on the sale in August, and on no other sale. To this the defendant objected, because, he claimed, all the evidence should be considered by the jury. The defendant called no witness. The court instructed the jury that they should consider only the evidence in regard to the sale in August, and the jury returned a verdict of guilty for a sale in the last of August 1856.

"To sustain the present complaint, the government called said Morse, and proposed to put in the same testimony of a sale in September, that Morse had testified to previously. The defendant objected to the testimony, because the same sale had been previously testified to in the first trial, when the sale was alleged to be subsequent to the sale alleged in the present complaint.

The court admitted the testimony; and instructed the jury that if, from the testimony, they found a sale of intoxicating liquors other than the one on which the jury had convicted the defendant previously, then they might find the defendant guilty. The jury returned a verdict of guilty of a sale in the last of September. The defendant excepts."

E. L. Barney, for the defendant. The district attorney, after putting in the evidence at the first trial, had no power to withdraw it, or any part of it, from the consideration of the jury. If he intended to use the testimony, he should have taken the complaint which alleged the first sale in order of time, and have put in so much of the testimony as was necessary for the purpose of proving one sale and no more. The jury had no means of knowing what evidence had been given to the other jury.

J. H. Clifford, (Attorney General,) for the Commonwealth, cited *State* v. *Ainsworth*, 11 Verm. 91.

By the Court. At the first trial, the court in the exercise of its discretion permitted the district attorney to confine the evidence to a particular sale, and to withdraw all evidence which did not bear upon that sale; and protected the defend-

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ant's rights by instructing the jury to disregard the evidence so withdrawn. As the time need not be proved as laid, that evidence, not having been submitted to the jury at the first trial, was rightly used to convict the defendant at the second trial; and oral evidence was admissible to show what was in fact submitted to the jury in the previous case. *Sawyer* v. *Woodbury*, 7 Gray, 499. *Exceptions overruled.*

COMMONWEALTH *vs.* MICHAEL BURNS.

An indictment for being a common seller of "intoxicating liquors, and mixed liquors, part of which is intoxicating," is supported by proof of three sales of intoxicating and none of mixed liquors.

THOMAS, J. The indictment charges that the defendant was a common seller of "intoxicating liquors, and mixed liquors, part of which is intoxicating." The government offered evidence tending to show three sales of intoxicating liquor, but no sales of mixed liquors. The defendant requested the court to instruct the jury that unless they were satisfied upon the evidence there had been three sales of both intoxicating and mixed liquors, as charged in the indictment, the defendant was entitled to their verdict. The court declined so to instruct the jury, but instructed them that if they were satisfied the defendant had made three sales of intoxicating liquors within the time alleged in the indictment, the government would be entitled to a verdict.

This was clearly right. Three sales of either intoxicating or mixed liquors within the time alleged made the defendant a common seller.

The case may be distinguished from *Commonwealth* v. *Livermore*, 4 Gray, 18. There the defendant was charged with the sale of "intoxicating and spirituous liquors," that is of liquors having the two qualities of intoxicating and spirituous. They might be intoxicating and not spirituous. Unless they had both

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qualities they did not meet the requisition of the indictment. In this case the defendant is charged with being a common seller of intoxicating liquors and mixed liquors, part of which is intoxicating. The sale of either constitutes the offence. *Commonwealth* v. *Grey*, 2 Gray, 503.

It is sometimes said the lines of distinction are nice. That may be true, but they must be drawn. As to matters seemingly most diverse, there is a point where the line of demarcation becomes faint and shadowy. Night and day are diverse, and it is hard sometimes to say when night has passed the line and broken into day; but most important rights may depend upon the fact. *Exceptions overruled.*

C. I. Reed & B. Sanford, for the defendant.

I. H. Clifford, (Attorney General,) for the Commonwealth.

COMMONWEALTH *vs.* HORATIO LINCOLN.

On the trial of an indictment for being a common seller of intoxicating liquors and for single unlawful sales, the district attorney was allowed, against the defendant's objection, to ask a witness who had testified to a single sale to himself, whether he had not previously said that the defendant had made three sales to him. *Held*, that subsequently abandoning the count for being a common seller took away all right of exception.

On the trial of an indictment for unlawfully selling intoxicating liquor, evidence that there were implements and materials for selling liquor in the defendant's shop is competent.

INDICTMENT on *St.* 1855, *c.* 215, containing three counts, one for being a common seller of intoxicating liquor, and the others for single unlawful sales.

At the trial in the court of common pleas before *Briggs*, J., a witness for the Commonwealth testified that he made one purchase of liquor, and no more, from the defendant within the time alleged. The district attorney then asked him if he had not within a few days told him that he had made three purchases of liquor from the defendant. The judge, against the objection of the defendant, allowed the question, because he deemed the witness to be a reluctant and unwilling one. After

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the evidence was all in, the district attorney said he should not ask for a verdict on the first count, but only on the second and third counts. The defendant thereupon requested that the jury might be instructed that evidence, previously introduced, that there were implements and materials for selling liquor in the defendant's shop, was not to be considered by them in determining whether the defendant was guilty of the charges contained in those counts. But the judge refused so to do. The defendant, being convicted, alleged exceptions.

C. I. Reed, for the defendant. 1. The question objected to should not have been allowed to be put to the witness. *Commonwealth* v. *Starkweather*, 10 Cush. 60. *Commonwealth* v. *Welsh*, 4 Gray, 535.

2. The fact that there were in the shop materials and implements for selling liquor, though they might have tended to show that the defendant was a common seller, had no proper tendency to show that sales were made to the persons named in the second and third counts. *Commonwealth* v. *Madden*, 1 Gray, 486. *Commonwealth* v. *Harvey*, 1 Gray, 487. *Commonwealth* v. *Tuttle*, 1 Cush. 2.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Thomas, J. 1. The question asked the witness was, we are inclined to think, irregular. What was the answer does not appear; but it does appear that the count charging the defendant with being a common seller was abandoned, and that the question and answer could be of no moment.

2. The evidence of there being in the shop materials and implements for the sale of liquor was competent upon the charges of single sales. The question whether sale or gift might depend upon it. *Exceptions overruled.*

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COMMONWEALTH *vs.* JAMES KEEFE.

An indictment for keeping a nuisance in violation of *St.* 1855, c. 405, § 1, on a day named, "and on divers other days and times between that day and the day of the finding and presentment of this indictment," states the time with sufficient certainty.

INDICTMENT, averring that the defendant at Taunton on the 1st of June 1856, "and on divers other days and times between that day and the day of the finding and presentment of this indictment," did keep and maintain a certain building, used as a house of ill fame, and for other purposes, contrary to *St.* 1855, *c.* 405, § 1.

The defendant, after conviction in the court of common pleas, moved in arrest of judgment, that it did not appear that the presentment and finding were upon the same day. *Sanger*, J. overruled the motion, and the defendant alleged exceptions.

J. Brown, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

METCALF, J. The only open question in this case is, whether the time of the commission of the offence, with which the defendant is charged, is set forth with legal certainty by the allegation that it was on a day certain and between that day and the day of "the finding and presentment" of the indictment.

It has been decided that the time is sufficiently certain, in cases of this nature, when alleged to have been on a certain day, and between that day and the day of "the finding" of the indictment; *Commonwealth* v. *Tower*, 8 Met. 527, and *Commonwealth* v. *Wood*, 4 Gray, 15; and that it is not sufficiently certain, when alleged to have been on a day certain and between that day and the day of "the finding, presentment and filing" of the indictment. *Commonwealth* v. *Adams*, 4 Gray, 27. And this last case is relied on, by the present defendant, in support of his exceptions. But it does not support them. The ground of decision in that case, as stated by the court, was this: "The day of the finding and presentment is not necessarily, nor

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by any reasonable intendment, identical with the day of the filing of the indictment. They are separate and distinct acts, performed by two distinct and separate agencies. The former" (the finding and presentment) "is the act of the grand jury; the latter" (the filing) "is the duty of the clerk. They cannot be simultaneous, nor is it necessary that the one should take place within any fixed or certain time after the other. Indeed, in ordinary practice, they often occur on different days. It was therefore impossible" (in the case then before the court) "to ascertain with accuracy within what limits the charge alleged in the indictment was intended to be confined." It is manifest from this passage, that "the finding and presentment" were regarded by the court as one and the same act, and that the word "presentment" had no meaning different from, or additional to, the word "finding," but was mere repetition and redundancy. This form of indictment is without any approved precedent, and has been unknown, we believe, until recently. And we cannot withhold the expression of our regret, that a needless departure from the usual and judicially sanctioned forms of indictment so often embarrasses and delays, and sometimes wholly stops, the course of justice.

In the English indictments for a continuing offence, the charge is, that the defendant, on a day named, and between that day and the day of "the taking of this indictment," committed certain acts. And this form is still occasionally used in New Hampshire and Maine. *State* v. *Bailey*, 1 Foster, 343. *State* v. *Sturdivant*, 21 Maine, 10. *State* v. *Stevens*, 40 Maine, 559. In this commonwealth, instead of the words above quoted, the words "the finding of this indictment" have long been substituted; and, as already stated, that form has been held to be proper and sufficient. In some of the other states, instead of either of the forms above mentioned, the words "the day of making this presentment" are adopted; and we have no doubt that this form is equally good. For every indictment is a presentment, in one of the established common law meanings of the word "presentment." 2 Inst. 739. 4 Bl. Com. 301.

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If, in the indictment in this case, the word "presentment" means the delivery of the indictment to the court, by the grand jury, which act is not simultaneous with the finding of it, then the indictment is bad, for the reason on which the decision was founded in *Commonwealth* v. *Adams*, and the court, in that case, erred in regarding the finding and presentment as one and the same act. But we still hold as we held in that case; and for these reasons: Every indictment begins with the words, "the jurors on their oath present." What do they present? Not a parchment or paper, on which an accusation against a certain person is set forth in writing, in legal form, and signed by their foreman; but that a certain person has committed certain acts, which are set forth in writing. It is perfectly clear that the word "present" means nothing more than that the jury "represent" or "show" to the court that a certain person has committed a certain offence. The jury present what they find to be the facts in a particular case, and they find what they present. There is no difference, therefore, between the legal meaning of a finding and a presentment, as used in the indictment before us. If it had been alleged that the defendant, on a day certain, and between that day and the day of the finding of the indictment and the presentment thereof to the court, committed the acts with which he is charged, the time might, perhaps, have been held to be defectively set forth, according to the decision in *Commonwealth* v. *Adams*. The word "presentment" might then have meant delivery into court.

Motion in arrest overruled.

Commonwealth *vs.* Martin Hoye.

An indictment on *St.* 1855, *c.* 405, § 1, which avers that the defendant kept and maintained a building for the illegal sale and keeping of intoxicating liquors on a day named "and on divers other days and times between that day and the day of finding this indictment," sufficiently charges a nuisance during the whole time.

Upon the trial of an indictment under *St.* 1855, *c.* 405, for keeping and maintaining a build-

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ing for the illegal sale and keeping of intoxicating liquors, it appeared that the building contained a front shop where groceries only were sold, and a back shop where liquors were sold; many sales of liquor and other articles were shown to have been made, but none by the defendant, except once of some oats in the front shop; it appeared that the same person sold groceries in the front and liquor in the back shop; the defendant was often in the front shop, but was not proved to have been behind the counter, nor to have been in the back shop but once, when he went with a constable who had come to the building with a warrant to arrest another person, and told that person to go with the constable before the justice, and went with them, and told the justice who issued the warrant that he had half a dozen more boys; and afterwards told a constable that another person sought was not in the back shop, but he might look for him there if he wished. *Held*, that there was sufficient evidence to be submitted to the jury.

INDICTMENT on *St.* 1855, *c.* 405, alleging that the defendant at Taunton, "on the first day of March in the year of our Lord eighteen hundred and fifty six, and on divers other days and times between that day and the day of finding this indictment," kept and maintained a certain building, then and there used for the illegal sale and illegal keeping of intoxicating liquors.

At the trial in the court of common pleas before *Briggs*, J., the defendant objected to the admission of evidence of any acts that did not occur on the 1st of March 1856. But the court admitted evidence of illegal sale and keeping between said 1st of March and the day of finding the indictment. The only evidence tending to show that the defendant kept or maintained the building as alleged was the following:

"No acts of sale of liquor by the defendant were shown, but it appeared that he was frequently in the shop described, generally sitting down, doing nothing. It did not appear that he was ever behind the counter in said shop; but all the acts of sale or delivery of liquor were shown to have been made by some other person; and it was shown that all acts of sale of any article in the shop, except as hereinafter mentioned, were made by other persons than the defendant. Many instances were shown of farmers selling vegetables and other articles in said shop; but in every instance said sales were made to a man by the name of Thomas Hoye.

"It was shown that in one instance the defendant delivered and took pay for half a peck of oats, which stood outside the counter, in the shop. What the defendant did with the money received by him for the oats did not appear. It ap-

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peared that in the building described there were two shops or rooms, with an entry between them. The front shop contained groceries, but no liquor. The back shop contained liquor, and it was in this place that all the acts of illegal sale or keeping of liquor were shown. There was an entrance from outside the building into the back shop, by passing through the entry. There was evidence that the same persons, who sold liquor in the back shop, sold groceries in the front shop.

"The defendant was never shown to have been in the back shop but once, and on that occasion a constable with a warrant for the arrest of Michael Hoye went into the front shop and told the defendant (who was there) that he had a warrant against Michael Hoye for selling liquor, and then went into the back shop, and the defendant followed him, and asked the name of the witness stated in the warrant, and told Michael to go with the constable, and then accompanied them to the office of the justice who issued the warrant. On coming into the presence of the justice, the justice said to the defendant, 'Well, Mr. Hoye, we have got one of your boys;' to which the defendant replied, that there were 'half a dozen more of them.'

"At another time it appeared that the constable went to said shop with a capias for a person by the name of Pratt, and asked the defendant if Pratt was there, and asked for liberty to go into the back room; the defendant said he was not there, and told the constable he might go into the back room to look for him if he wished."

The defendant asked the court to instruct the jury that this evidence was not sufficient to warrant their finding that he kept and maintained said building as alleged. But the court declined so to instruct the jury, and instructed them that the question was for them, and that there was evidence from which they might find that the defendant did keep and maintain said building. The defendant was convicted and alleged exceptions.

C. I. Reed, for the defendant. 1. There is no proper averment of one continuing offence in the indictment. Either the indictment is bad for duplicity, or else a part of the averment of time must be rejected as surplusage, leaving it with an offence well

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charged on the 1st of March 1856 only. *Pierce* v. *Pickens*, 16 Mass. 470. *English* v. *Purser*, 6 East, 395. *Commonwealth* v. *Bryden*, 9 Met. 137. *Commonwealth* v. *Elwell*, 1 Gray, 463. *Monkton* v. *Ashley*, 6 Mod. 38, and 2 Salk. 638. 1 Saund. 24, note. 2 Rol. Ab. 541, pl. 1.

2. The evidence would not warrant the jury in finding a verdict against the defendant, and so the court should have instructed them. *Commonwealth* v. *Packard*, 5 Gray, 101.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Dewey, J. 1. We have had occasion to consider the question as to this form of alleging the time of the commission of the offence, and find that the mode adopted in this indictment is sanctioned by precedent as well as long practice. It has been the usual form in indictments against parties charged with being common sellers of spirituous liquors, beginning with the case of *Commonwealth* v. *Pray*, 13 Pick. 359. It seems to be the common form in which nuisances of this character are alleged as to the time of the alleged offence.

There seems to be less technical accuracy in this as a description of one continued offence, than to allege that the defendant kept and maintained the building for the alleged illegal purposes "on the first day of March, and from thence hitherto to the day of finding this indictment;" but it will be found to be well sanctioned in criminal indictments for nuisance. This count thus properly charging a nuisance from the first day of March to the day of finding the indictment, it was competent for the government to offer proof of any act during the entire period thus stated in the indictment.

2. The further question was as to the sufficiency of the evidence in the case to establish the guilt of the defendant. There was evidence proper to submit to the jury for their consideration; and the judge was not required to instruct the jury that the evidence was not sufficient to warrant their finding that the defendant kept and maintained the building as alleged in the indictment. It was peculiarly a case for the jury, and not for the court, upon the question whether the defendant or some other person was the party who kept and maintained the building.

Exceptions overruled.

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Commonwealth *vs.* Patrick McCaughey.

An indictment on *St.* 1855, *c.* 405, for keeping "a certain building," used for the illegal sale and illegal keeping of intoxicating liquors, is not maintained by proof of occupying and keeping for that purpose one of several tenements in the same building.

Indictment on *St.* 1855, *c.* 405. The indictment averred that the defendant kept and maintained "a certain building," used for the illegal sale and illegal keeping of intoxicating liquors, whereby, and by force of the statute in such case made and provided, "the said building" was a common nuisance.

At the trial in the court of common pleas, it was in evidence that in the building in which was the defendant's shop, there were several other tenements occupied by different families, and not occupied by the defendant. The defendant contended that this proof of keeping a tenement only did not support the averment that the defendant kept a building. But *Briggs*, J. ruled that there was no variance; the jury returned a verdict of guilty, and the defendant alleged exceptions.

C. I. Reed, for the defendant. The statute, by mentioning both "building" and "tenement," shows that the words were not considered synonymous by the legislature; and the variance between the indictment and the proof is fatal. Arch. Crim. Pl. (10th ed.) 99. Rosc. Crim. Ev. (2d ed.) 103. 2 Russell on Crimes, (7th Amer. ed.) 140 note, 794. *Commonwealth* v. *M'Monagle*, 1 Mass. 517.

J. H. Clifford, (Attorney General,) for the Commonwealth. Every tenement is part of a building, and the statute imposes the same punishment on keeping and maintaining of the part, as of the whole. The variance is therefore immaterial. In the analogous case of an indictment for keeping a house of ill fame, it is never necessary to prove that the whole house was used for the illegal purpose.

Metcalf, J. The court are of opinion that the ruling, as to the alleged variance between the averment in the indictment and the proof offered to sustain that averment, was erro-

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neous. The St. of 1855, c. 405, § 1, declares "all buildings, places or tenements, used for the illegal sale or keeping of intoxicating liquors," to be common nuisances. The second section prescribes the punishment for keeping or maintaining such nuisances; that is, any building, place or tenement, used for the purpose mentioned in the first section. Now as a building is a tenement, though a tenement may be a part of a building, or something besides a building or a part thereof, the word "building," in this statute, is superfluous, unless we can find a meaning for it, which shall give it some effect. And we are bound to search for such a meaning. For it is an anciently established rule in the interpretation of statutes, that such a sense is to be made upon the whole statute, that no clause, sentence or word shall prove superfluous, void or insignificant, if, by any other construction they may all be made useful and pertinent. 1 Show. 108. Bac. Ab. Statute, I. 2. We can give effect to the word "building," in the statute before us, by construing it to mean the whole building, and the keeping or maintaining thereof for the illegal sale or illegal keeping of intoxicating liquors therein to mean the keeping or maintaining of the whole building, by the same person or persons. And we see no other way in which we can give the word any distinctive meaning. Whether the use of the word "tenement" only, in an indictment, would not be equally proper and sufficient, when the whole building is held by one occupant, we need not now consider. But we are of opinion that the keeping or maintaining of an apartment in a building, which apartment is held separately from the rest of the building, is not a keeping or maintaining of a building, but is the keeping or maintaining of a tenement, within the meaning of the statute.

Exceptions sustained.

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COMMONWEALTH *vs.* PETER E. DUNBAR.

Upon the trial of an indictment on *St.* 1855, *c.* 405, § 1, for keeping a building used for the illegal sale and keeping of intoxicating liquors, the only evidence was that the occupant of the house and servants of the defendant sold liquor there. The court refused to rule that this evidence was insufficient; and merely instructed the jury that it was a question of fact for them to decide. *Held*, that the defendant's exceptions must be sustained.

INDICTMENT on *St.* 1855, *c.* 405, § 1, averring that the defendant at a certain time and place "did knowingly permit a certain building and tenement, then and there under his control, to be then and there used for the illegal sale and keeping of intoxicating liquors." Trial and conviction in the court of common pleas before *Briggs*, J., who signed a bill of exceptions, the material part of which was as follows:

"The only evidence that was offered by the government of illegal sale or keeping of liquor in said house was that between the first day of June 1856 and the day of the finding of the indictment a man by the name of Michael Burns occupied, during a part of the time, the basement of said public house, and a part of the time an adjoining building, for the purpose of keeping and selling intoxicating liquor; that when persons in said public house desired liquor, they rung the bell of the room in which they happened to be, and sent an order to Burns for such liquor as they pleased, which was sometimes brought to them by Burns himself and sometimes by the servants of Dunbar, the defendant; and that payment for said liquor was sometimes made by persons at their rooms when the liquor was brought to them, and in some cases the pay was sent to Burns.

"The defendant requested the court to rule that this evidence was not sufficient to sustain the allegations as to the keeping and sale of intoxicating liquor. But the court declined so to rule, and instructed the jury that it was a question of fact for them to decide."

C. I. Reed, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth. This is the case contemplated by the statute. The defendant

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kept the house, and maintained it, and, by arrangement, permitted his servants to take the orders.

By the Court. From the evidence it does not appear that pay was made to the landlord, or that any sales were made with his knowledge or permission. That was a question of fact for the jury to decide; but it was to be decided under proper instructions as to the effect of a sale in his house, by his servants; and because no such instructions were given, our judgment must be *Exceptions sustained.*

Commonwealth *vs.* Oscar M. Brooks.

On the trial of an indictment, the Commonwealth relied on the testimony of an accomplice; and the judge instructed the jury that they might convict on the testimony of an accomplice alone, but that it was unsafe to rely upon it without confirmation on some point material to the issue, and connecting the defendant with the offence charged; and submitted the question of corroboration to them upon all the evidence in the case. *Held*, that the defendant had no ground of exception.

A conviction of an offence cannot be proved by an unofficial copy of the clerk's docket, supported by the copyist's oath.

An indictment on the Rev. Sts. c. 126, § 39, which charges the defendant, in the words of the statute, with wilfully and maliciously administering a certain poison to the horse of another person, is sufficient, without further averment of any criminal intent, or of any injury to the horse.

Indictment on Rev. Sts. c. 126, § 39, averring that Charles Pinkham at Taunton on the 16th of March 1857, "with force and arms, wilfully and maliciously did administer to a certain horse, of the value of one hundred and fifty dollars, of the property of one Henry F. Cobb, a large quantity, to wit, fifty grains, of a certain poison called strychnine;" and that Oscar M. Brooks at Taunton, before the said felony was committed in manner and form aforesaid, to wit, on the same day, "did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said Charles Pinkham the said felony in manner and form aforesaid to do and commit, against the peace of said commonwealth and contrary to the form of the statute in such case made and provided." Trial in the court of com-

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mon pleas in Bristol at September term 1857, before *Briggs*, J., who allowed a bill of exceptions setting forth the following case

The principal witness called by the government was Frank Marsh, who testified that he aided in the commission of the principal felony, and that he together with Charles Pinkham was employed by the defendant, to commit the felony charged to have been committed by Pinkham. The testimony of Marsh was that the defendant said to him and Pinkham in Leonard Street that he would give fifty dollars for poisoning Cobb's horse, and would get the stuff for the purpose; that on Monday the 16th of March, in Pinkham's presence, the defendant said he had been to Providence the Saturday before, and got the stuff; after saying this, the defendant went with him to point out Cobb's horse, and on his return said to the witness and Pinkham that he had had trouble with Cobb, and wanted to make him afraid of him, and would pay well; and he then gave the witness a package containing the stuff, and he and Pinkham put it into apples, and gave it to the horse at half past six that evening.

Lydia Barnes testified that at a certain time in the day when it was testified by Marsh that the felony was committed, but when she could not say, she saw a man of middle size, with an overcoat on having loose flowing sleeves, near the place where the felony was committed. And there was testimony in the case, offered by the defendant, tending to show that the defendant from an early hour in the morning until after seven o'clock in the evening was either on the way to or in the city of Providence, and one of his witnesses testified that while in Providence the defendant wore a raglan coat with loose sleeves.

The district attorney further relied on the following facts as controlling Marsh's testimony: Marsh testified that in the evening, and soon after the principal felony had been committed, he communicated the same to Lydia Barnes; and the district attorney contended that, although he could not inquire as to the disclosure, the defendant might do so, yet had not, and this was a fact which the jury might consider in corroboration. Marsh testified that when he met the defendant on the 16th of March

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the defendant's brother was with him, and was present at part of their interview; yet the defendant did not call his brother to contradict this testimony, nor give any reason why he did not call him. Pinkham was in the jail in Taunton, and the defendant did not call him. The district attorney produced a phial from which Marsh testified the stuff was taken which was given to the horse; and there was evidence tending to prove that it was found in the place where Marsh said it was put after the stuff from it was given to the horse.

Marsh testified that he had been tried in Boston under the name of Hugh C. Tivnon, which was his true name; but declined to state for what offences he had been so tried, and also declined to answer the question if he had been in the State Prison. To prove that Marsh had been convicted of crime in Boston, and sentenced to the State Prison, the defendant offered to show by a police officer from Boston that Marsh was a resident of the State Prison in 1852, 1853 and 1854. The district attorney objected, and his objection was sustained by the court. The witness said he had examined the records of the court in Boston, and had made a copy of the clerk's docket, which was produced, and offered in evidence, but excluded by the court.

The judge instructed the jury, "that when an accomplice was offered as witness by the government, it was competent for the jury to convict on the testimony of an accomplice alone; the principle which allowed the evidence to go to the jury necessarily involved in it a power in them to believe it; but the source of this evidence was so corrupt that it was always looked upon with suspicion and jealousy, and it was deemed unsafe to rely upon it without confirmation; that the rule as to confirmation laid down by the supreme court was that the corroborating evidence must relate to some portion of the testimony which is material to the issue;" but that, "as the defendant in this case had contended that the rule was that the corroborating facts must be such as to connect the defendant with the offence charged, and had produced some authority to this point, he would so instruct the jury, and did so instruct them."

After the judge had finished his charge, the defendant's coun-

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sel asked him to instruct the jury that "no fact had been shown which in law had any tendency to connect the defendant with procuring Pinkham to commit the felony charged to have been committed by Pinkham." But the judge declined so to instruct the jury, and said it was a question for them to determine upon all the evidence submitted.

The defendant, being convicted, alleged exceptions to all these rulings and instructions; and also to the overruling of a motion in arrest of judgment, upon the ground that "the indictment does not set forth any criminal offence in accordance with the rules of law; because it is not averred that the poison was administered to said horse with intent to kill or injure, or with any criminal intent; and because it is not averred that said horse was injured or killed by the administering of said poison."

B. Sanford, for the defendant. The question whether there is any evidence to corroborate the testimony of an accomplice is a question of law, upon which the jury should be instructed; although they may convict without such corroboration, if they see fit. In order to amount to corroboration, the corroborated evidence must relate to some portion of the testimony which is material to the issue. Here there was no such corroboration, and the refusal of the judge to instruct the jury accordingly is ground of exception. *Commonwealth* v. *Bosworth*, 22 Pick. 399. Rosc. Crim. Ev. (2d ed.) 145. *Commonwealth* v. *Packard*, 5 Gray, 101.

C. I. Reed, also for the defendant. The clerk's docket is competent evidence of the doings of the court; and may be proved by the testimony on oath of the witness who made the copy. *Read* v. *Sutton*, 2 Cush. 115. 1 Greenl. Ev. § 508.

Judgment should have been arrested, for the reasons assigned in the motion. *Penhallo's case*, Cro. Eliz. 231. *The King* v. *Phillipps*, 6 East, 464. *Rex* v. *Woodfall*, 5 Bur. 2666. *The King* v. *Mason*, 2 T. R. 581. *Commonwealth* v. *Slack*, 19 Pick. 305. *Commonwealth* v. *Collins*, 2 Cush. 556. *Commonwealth* v. *Thurlow*, 24 Pick. 374. *Commonwealth* v. *Pray*, 13 Pick. 359. *Rex* v. *Horne*, Cowp. 683. *Carter* v. *Andrews*, 16 Pick. 1. *Commonwealth* v. *Child*, 13 Pick. 198. *Snell* v. *Snow*, 13 Met. 278.

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Bloss v. *Tobey*, 2 Pick. 328. *Commonwealth* v. *Tuck*, 20 Pick. 362. 3 Greenl. Ev. § 13.

J. H. Clifford, (Attorney General,) for the Commonwealth.

METCALF, J. The instructions given to the jury conformed to the settled law. *Commonwealth* v. *Bosworth*, 22 Pick. 397. So did the exclusion of the offered evidence of Marsh's conviction of a state prison offence. A duly authenticated copy of the record of his conviction was the only admissible evidence that he had been convicted. 1 Greenl. Ev. § 513. The exceptions taken at the trial must therefore be overruled.

The motion in arrest of judgment must also be overruled. It is enacted by the Rev. Sts. c. 126, § 39, that "every person, who shall wilfully and maliciously kill, maim or disfigure any horses, cattle or other beasts of another person, or shall wilfully and maliciously administer poison to any such beasts, shall be punished," &c. And the offence committed by Pinkham, which this indictment alleges that the defendant incited and procured Pinkham to commit, is set forth in the terms of the statute, viz. that he wilfully and maliciously did administer to a horse, of the property of Henry F. Cobb, a poison called strychnine. The objection made to the indictment is, that it does not allege that the poison was administered with an intent to kill or injure the horse, or that the horse was thereby killed or injured. But the clause of the statute, on which the indictment is framed, does not make punishable the killing or injuring of another's beast by administering poison, nor the administering of poison with intent to kill or injure such beast. And this is one of that class of statute offences which are sufficiently described in an indictment by being set forth in the words of the statute, without more, because those words, *ex vi terminorum*, import all that is necessary to a legal description of the offence. See *Commonwealth* v. *Ashley*, 2 Gray, 357. The word "wilfully" in the present indictment, means intentionally, and the word "maliciously" imports a criminal motive, intent or purpose. *Commonwealth* v. *Walden*, 3 Cush. 558. If such motive, intent or purpose is not proved to the satisfaction of the jury, on the trial of a defendant, he must be acquitted. Rosc. Crim. Ev. (2d ed.) 338.

Exceptions and motion in arrest overruled.

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COMMONWEALTH *vs.* FREDERICK SOWLE & others.

An indictment on Rev. Sts. c. 126, § 39, which avers that the defendant did wilfully and maliciously kill a horse of another person, is sufficient, without more particularly setting forth the means or mode of killing.

INDICTMENT on Rev. Sts. *c.* 126, § 39, alleging that the defendants at Freetown on the 31st of August 1856, "with force and arms, a certain horse, of the value of twenty five dollars, of the property of one Joseph Wilbur, then and there wilfully and maliciously did kill, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

The defendants, being convicted in the court of common pleas, moved in arrest of judgment, that the indictment contained no sufficient allegation of the manner, mode or process of committing the offence. *Sanger*, J. overruled the motion, and the defendants alleged exceptions.

J. C. Blaisdell, for the defendant. The mode, manner and means by which the killing was accomplished ought to have been more fully set out. 3 Chit. Crim. Law, 1088. *State* v. *Aydelott*, 7 Blackf. 157. *Commonwealth* v. *Moore*, 11 Cush. 603. *Kit* v. *State*, 11 Humph. 167. *State* v. *Raines*, 3 McCord, 533. *Commonwealth* v. *Thurlow*, 24 Pick. 374. It is not sufficient to allege merely that the act was done "wilfully and maliciously," in the words of the statute. *State* v. *Jackson*, 12 Ired. 329. *Commonwealth* v. *Walden*, 3 Cush. 558. Archb. Crim. Pl. (10th ed.) 50. Whart. Crim. Law, 133. To support the indictment, the government must prove that the act was done either from malice to the owner, or from a spirit of wanton cruelty or wicked revenge. *The King* v. *Pearce*, 1 Leach, (4th ed.) 527, and 2 East P. C. 1072. *The King* v. *Shepherd*, 1 Leach, 539, and 2 East P. C. 1073. *Commonwealth* v. *Walden*, 3 Cush. 558. *State* v. *Latham*, 13 Ired. 33. If necessary to prove it, it must be alleged. *The State* v. *Philbrick*, 31 Maine, 401. *Commonwealth* v. *Moore*, 11 Cush. 603. Whart. Crim. Law, 117.

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J. H. Clifford, (Attorney General,) for the Commonwealth.

METCALF, J. The Rev. Sts. *c.* 126, § 39, prescribe a punishment for "every person who shall wilfully and maliciously kill, maim or disfigure any horses, cattle or other beasts of another person." The offence thus made punishable was previously described in nearly the same words, by *St.* 1804, *c.* 131, § 4, and by the English Sts. 22 & 23 Car. 2, *c.* 7, and 9 Geo. 1, *c.* 22. And this indictment alleges that the defendants did wilfully and maliciously kill a horse of another person named. Is this a sufficient averment of the statute offence; or should "the manner, mode or process" of killing have been set forth, as is contended by the defendants' counsel?

The court are of opinion that the indictment is sufficient. It is in the form that is found in English books which are deemed safe precedents. Crown Circ. Comp. (7th ed.) 218. 2 Stark. Crim. Pl. (2d ed.) 579. 3 Chit. Crim. Law, 1086, 1087. Archb. Crim. Pl. (13th ed.) 451, and in the previous editions. In *Rex* v. *Chalkley*, Russ. & Ry. 258, this form was not objected to, although other questions in the case were carried before all the judges.

American books of forms contain indictments like this; that is, setting forth the offence in the words of the statutes on which they are framed, without any description of the manner of killing. And indictments at common law, for the wilful and malicious killing of beasts, have been drawn in the same manner. Both have been sustained. *State* v. *Scott*, 2 Dev. & Bat. 35. *Taylor* v. *State*, 6 Humph. 285.

Under *St.* 9 Geo. 1, *c.* 22, a conviction was held to be right, on an indictment which alleged that the defendant feloniously, maliciously, &c. did maim and wound two asses, the property of a third person; the manner of maiming and wounding not being stated. *Rex* v. *Whitney*, 1 Moody, 3. See also Crown Circ. Comp. 219, 220; *Rex* v. *Briggs*, 1 Moody, 318; *Erle's case*, 2 Lewin, 133. *Motion in arrest of judgment overruled.*

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JAMES C. MARA *vs.* MALTIAH H. PIERCE.

Knowledge of the occupation and improvement of land is not such "actual notice" of an unrecorded deed of the land to the occupant, as will give effect to the deed against others than the grantor, under the Rev. Sts. *c.* 59, § 28.

On a writ of entry to recover three lots of land, the tenant pleaded the general issue with a specification of title in himself to the first lot; the demandant proved the conveyance of the three lots to himself, and showed a title in his grantor to the first and second lots, but none to the third. *Held*, that the demandant was entitled to recover the third lot, the tenant showing no title thereto.

WRIT OF ENTRY, dated October 24th 1853, to recover three several lots of land in New Bedford. The tenant pleaded the general issue, with a notice of title in himself to one of the lots, which was his homestead, under a lease for life. The case was submitted to the full court upon the following report:

The demandant introduced a warranty deed from his father-in-law John D. Hathaway to himself of the three lots claimed in the writ, dated, acknowledged and recorded on the 1st of October 1853; also a warranty deed from Judith Pierce to said Hathaway of two of the lots, one of which was the homestead, dated January 4th 1852, acknowledged September 20th 1852, and recorded October 1st 1853. It did not appear whether the second deed was executed before or after the first was recorded. It appeared that Hathaway, at the time of executing his deed to Mara, had no actual seisin of the premises, and no seisin in law except so far as may be inferred from the facts above stated. The possession of the premises by the tenant was admitted.

The tenant introduced evidence that his son purchased the homestead in question, gave to the tenant and his wife (since deceased) a lease of the same during their natural lives, and then sold and conveyed it to his sister Judith, (under whom the demandant claimed,) she knowing of the life lease. There was no direct evidence that Hathaway or the demandant had any knowledge of that lease. It appeared in evidence however, that the tenant had been in uninterrupted possession of the premises for fifteen years prior to the date of the writ, and had

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improved the same, and that during this time Judith Pierce lived on the premises apart from the tenant.

The tenant contended that under the circumstances the evidence of possession was competent, and that the question of notice, upon the evidence and circumstances of the case, was a question of fact for the jury, upon which he had a right to go to them. He also asked the court to rule that the demandant had shown no title to the lot not embraced in the deed from Judith Pierce to Hathaway.

But the court ruled against the tenant on all these points, and directed a verdict for the demandant, which was returned. The tenant alleged exceptions.

R. C. Pitman, for the tenant.

L. F. Brigham, for the demandant.

Dewey, J. The case of *Pomroy* v. *Stevens*, 11 Met. 244, seems to be decisive of the present case. Under the Rev. Sts. c. 59, § 28, an unrecorded deed is only valid as against the grantor and "persons having actual notice thereof." But the mere evidence of open occupation, possession and cultivation of the land by farming it, by a party who has an unrecorded deed thereof, is not sufficient to warrant the inference that a third person has actual notice of such conveyance, if we give effect to the opinion delivered in the case of *Pomroy* v. *Stevens*.

There is nothing in the facts here, that would justify a different ruling of the court from that given in the case cited. It is true that was a claim of title in fee simple, and this is a claim of a freehold for life merely, but we perceive no difference in the two cases on that account. The question of actual notice is a question of fact, proper to be submitted to the jury under suitable instructions from the court; but if in point of law the evidence is entirely insufficient to authorize the jury to find actual notice the court would so instruct the jury and direct them to return a verdict accordingly.

Evidence like that produced in the present case might properly be submitted to the jury, accompanied with other evidence tending to show actual knowledge of the existence of the unrecorded deed; but here none other of that character was offered.

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It was the naked case of long continued occupation and improvement of the premises. That was not enough, and the defence therefore must fail as to that part of the demanded premises in which the tenant sets up title in himself. The case of *Curtis* v. *Mundy*, 3 Met. 405, arose upon a different state of facts.

As to one of the other parcels demanded in this writ, it was objected at the trial that the demandant had shown no other title than a deed from Jonathan D. Hathaway, the other two lots having, as was conceded, been conveyed to Hathaway by Judith Pierce.

Under the plea of nul disseisin and nothing more, it would certainly be incumbent on the demandant to show a title to the premises in himself, and a failure so to do would be a failure to support his action. In the present case, the tenant pleaded the general issue, accompanied with a specification that the defence would be a title in himself to one of the lots, to wit, the homestead, thus implying at least that he made no claim of title in himself to the others.

The demandant had introduced a deed from Jonathan D. Hathaway of this lot to him. This was enough, if the defendant had not a title older than the date of that deed. Previous occupation under a claim of title would have been sufficient to show an older and better title in the tenant, and require the demandant to connect himself with some earlier title. The only question raised, as it would seem, as to this parcel, was upon the demandant's *prima facie* case. The deed from Hathaway was sufficient for that purpose, and as the tenant did not rely in defence upon any title in himself, by possession or otherwise, the ruling seems to have been correct, that the demandant was entitled to a verdict for that parcel; however otherwise it might have been if the tenant had relied upon an older title in himself to the premises. *Ward* v. *Fuller*, 15 Pick. 189.

Judgment on the verdict.

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JOHN H. POTTER *vs.* BENJAMIN F. GREENE.

A paragraph in a newspaper, which states that a certain person is a member of a certain partnership, but does not purport to be inserted by the partnership, is not admissible to charge him as such, merely on proof that he was a subscriber to the paper at that time, and never requested the editor to deny any such statement.

ACTION OF CONTRACT, in which the plaintiff sought to charge the defendant as one of the partners in a company that had undertaken to run the Sagamore Mill at Portsmouth, N. H., or as having held himself out as a copartner therein.

At the trial in this court, the plaintiff, for the purpose of showing that the defendant had held himself out as such copartner, called the editor of a newspaper published weekly at Pawtucket, who testified that Greene was a subscriber thereto on the 30th of September 1853, and that it was usually left at his house. The plaintiff offered to read from the paper of that date the following article:

"A company of gentlemen have purchased the valuable property of the Sagamore Thread Company at Portsmouth, N. H., and will immediately put the machinery into operation. B. F. Greene, Esq., of Central Falls, is one of the new company, and is to have charge of the manufactory. We have no doubt that under the superintendence of a gentleman of Mr. G.'s experience, the present high standing of the Sagamore thread will be fully sustained."

The plaintiff also offered to show that the defendant had never requested the witness to publish any denial of the statements in said paper. But he did not offer to show that the defendant in any way authorized the article, or that the particular paper or article was left at the defendant's house, or that he ever had any knowledge thereof, in any other way than might be inferred from the facts aforesaid.

To this evidence the defendant objected, and *Dewey*, J. excluded it, and, after a verdict for the defendant, reported the case to the full court.

C. B. Farnsworth, for the plaintiff, cited Collyer on Part. §§ 86,

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97, 775; *Hicks* v. *Cram*, 17 Verm. 449; *Goode* v. *Harrison*, 5 B. & Ald. 147; *M'Pherson* v. *Rathbone*, 11 Wend. 96.

E. H. Bennett, for the defendant, cited *Commonwealth* v. *Kenney*, 12 Met. 235; *Commonwealth* v. *Eastman*, 1 Cush. 189.

METCALF, J. The cases to which we have been referred by the plaintiff's counsel do not support the position to which they were cited. They do not tend to show that, upon the evidence given at the trial, the defendant held himself out as a partner in the Sagamore Thread Company. The phrase, "holding one's self out as a partner" imports at least the voluntary act of the party so holding himself out, or the act of others by his authority or permission. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. If he knows that his name is so used, though without his consent, his acquiescence may be inferred, if he do not publicly disclaim the connection. *Fox* v. *Clifton*, 6 Bing. 794, 795. Cary on Part. 19. In the case before us, it does not appear that the defendant ever was an actual member of the Thread Company, or ever held himself out as such, or ever knew that his name had been used as such. Whether he ever saw the newspaper paragraph is both uncertain and immaterial. If he saw it, we are of opinion that he was under no obligation, legal or moral, to give it a public contradiction. It might have been otherwise, if there had been an advertisement in the newspaper, purporting to have been inserted by the company, and representing that the defendant was one of its members. *Exceptions overruled.*

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PRINCE W. PACKARD & another *vs.* THOMAS H. MATTHEWS.

Service of a writ by attaching real estate, and leaving a summons at the last and usual place of abode, of a defendant who is out of the Commonwealth, and not a resident thereof, is not sufficient to warrant a judgment against him, without further notice according to the Rev. Sts. *c.* 92, § 3.

On the reversal by writ of error of a judgment of the court of common pleas for omission to give further notice according to the Rev. Sts. *c.* 92, § 3, this court has no power, under *c.* 82, § 20, to order such notice, but must enter a general reversal.

WRIT OF ERROR to reverse a judgment of the court of common pleas in favor of the defendant in error in a personal action brought by him against the plaintiffs in error. The errors assigned were, "that both the defendants in said suit were out of the Commonwealth at the time of the service of the summonses in said suit; that both said defendants were, at the said time, and have hitherto been, resident without the said commonwealth; that no notice, sufficient in law, of the commencement or pendency of said suit was given to the defendants, or either of them, before the rendition of judgment therein; that judgment in said suit was rendered upon the default of said defendants at the term of court to which the writ in said suit was returnable, and without appearance by the defendants, or in their behalf." Plea, *in nullo est erratum*, upon which issue was joined.

The service made in the original action, as shown by the officer's return, was by a general attachment of all the defendant's real estate in Dukes County, and leaving a summons for each of them "at their last and usual place of abode, they being out of the Commonwealth at that time."

Trial before *Thomas*, J., who allowed a bill of exceptions, which after reciting the pleadings, and the officer's return in the original action, concluded thus: "The parties went to the jury upon the issue presented by the assignment of errors, plea and joinder, the presiding judge interposing no objection. The jury returned a verdict for the plaintiffs in error. No other service was made before default and judgment than that indicated in the officer's return. The presiding judge thereupon ordered that

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the judgment be reversed, and that such entry be made on the docket. The defendant in error, feeling himself aggrieved by such decision and order, excepts thereto."

J. C. Stone, for the defendant in error. The finding of the jury, that the plaintiffs in error were in fact resident out of the Commonwealth at the time of the service of the original writ, is not conclusive of their right to have the judgment. Even if the plaintiffs were at the time of the service of the original writ actually resident in another state, the service was sufficient upon which to found a judgment: because the attachment gave the court jurisdiction. Rev. Sts. *c.* 90, § 44. *Morrison* v. *Underwood*, 5 Cush. 52. The words "out of the State" in §§ 44–48 must be interpreted to mean "resident out of the Commonwealth;" and these sections must be construed in connection with § 3 of *c.* 92, to which they in terms refer, and the various clauses of which cannot be taken disjunctively, but "or" must be taken to mean "and" in order to harmonize the provisions of the various sections.

The service required by the Rev. Sts. *c.* 90, § 45, at the defendant's last and usual place of abode, if he is out of the State, is not for the purpose of giving the court jurisdiction; for the attachment gave that. See *Tilden* v. *Johnson*, 6 Cush. 354. The return of the officer does not show that the plaintiffs in error were in point of fact resident out of the Commonwealth; and therefore no further notice was required under this section.

But if such notice was required, this court may now order it, under their power to render such judgment as the court of common pleas should have rendered. Rev. Sts. *c.* 82, § 20.

T. M. Stetson, for the plaintiffs in error, cited Rev. Sts. *c.* 90, § 48; *c.* 92, § 3; *Lee* v. *Boston*, 2 Gray, 490; *Bodurtha* v. *Goodrich*, 3 Gray, 508; *Downs* v. *Fuller*, 2 Met. 135; *Leonard* v. *Bryant*, 11 Met. 370, and 2 Cush. 35.

Dewey, J. The facts stated in the assignment of errors having been found by the jury, the entry of a reversal of the judgment in favor of the defendant in error was correct. The cases of *Downs* v. *Fuller*, 2 Met. 135, and *Leonard* v. *Bryant*, 11 Met. 370, and 2 Cush. 35, seem to have settled the construction of

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Rev. Sts. *cc.* 90 and 92, as to the service of writs, so far at least, that where the defendant is out of the Commonwealth at the time of the service, and not an inhabitant or resident thereof, and the only service made is by attaching real estate, and leaving a summons at the defendant's last and usual place of abode, the defendant is, in addition to such service, entitled to such further notice, and continuance of the action, as is provided in *c.* 92, § 3.

The reversal in a case like the present must be general, as this court cannot now make such order as the court of common pleas ought to have done. Had it been a judgment for a greater sum than it ought to have been, or error of that kind, the court might now render such judgment as the court of common pleas should have rendered. Rev. Sts. *c.* 82, § 20.

Judgment of reversal affirmed.

THOMAS RICHARDS & another *vs.* JESSE F. RICHARDS.

It seems that a demurrer to a bill which alleges that a *cestui que trust* sold land, and directed the trustee to convey, admits that there was an agreement in writing for the sale and conveyance of the land.

A trustee, having a naked legal title in land, cannot be restrained in equity from asserting his title or conveying it away, or compelled to convey it to one to whom the *cestui que trust* has transferred his title, without proof of a written agreement, or joining the *cestui que trust* as a party to the bill.

BILL IN EQUITY to restrain the prosecution of a suit at law to recover possession of land in Attleborough, or any conveyance thereof, except to the plaintiffs, and to have the defendant declared the trustee of the plaintiffs, according to their interests in the land, and for other relief.

The bill alleged that in 1832 Samuel Richards purchased the land from Virgil M. Bosworth, paid him the price thereof, and entered into possession, but caused the deed to be made to his brother, the defendant; that Samuel thus became the equitable owner and the defendant held the legal title in trust

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for him; that subsequently Samuel, by various deeds, without consideration, conveyed all his real estate to sundry persons, among whom were this defendant and Elihu Daggett; but still remained the owner of the land, sold portions of it from time to time, and took the purchase money to his own use, and at his request deeds were made by the defendant and Daggett pursuant to such sales; that afterwards, in 1835, Samuel sold a portion of the land to Thomas Richards, one of the plaintiffs, received the purchase money from him and directed Daggett to convey that portion to him, which Daggett did accordingly, and said Thomas entered upon and improved it; that at the time of this conveyance all the parties believed that the legal title of the land was in Daggett, in trust for Samuel, and that the defendant soon after the date of the conveyance knew of the purchase by Thomas; that in 1843 Thomas conveyed the land to the other plaintiffs, and in 1844 took a life lease of it from the latter to himself; and that the defendant refused to release his title to the plaintiffs, claimed to hold the land as his own, and not in trust for Samuel Richards, denied the sale by Samuel to Thomas, and had brought a writ of entry against Thomas to recover the land. The defendant demurred generally.

C. I. Reed, for the defendant.

T. D. Eliot, for the plaintiffs.

Bigelow, J. This cause has been argued upon the admitted fact that there was no agreement in writing for the sale and conveyance of the premises, set out in the bill. But for this admission, the question of the validity of such a contract, on the pleadings as they now stand, would not have been open. Story Eq. Pl. § 762. *Cozine* v. *Graham*, 2 Paige, 181. *Newton* v. *Swazey*, 8 N. H. 13.

It seems to us quite clear, that the contract is within the statute of frauds, and that no action will lie upon it against the defendant alone, because it was not in writing. It is an agreement with a *cestui que trust*, having the entire beneficial interest in a parcel of land, for its sale and conveyance by the trustee, who was seised of the naked legal title only. This is clearly a contract for the sale of an interest in land, and it is well settled

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that equitable as well as legal interests in land are embraced within the statute of frauds. *Smith* v. *Burnham*, 3 Sumner, 435.

We have not considered the question whether the facts set out in the bill, as to part performance of the verbal agreement, would be sufficient to warrant the court in taking cognizance of the case under *St.* 1855, *c.* 194, § 1, and enforcing the contract on the ground of fraud, because it is clear that the bill cannot be maintained for this purpose against the present defendant alone. Upon the allegations in the bill Samuel Richards, the alleged *cestui que trust*, is a necessary party. He has a direct interest in the subject matter of the suit; his rights will be affected by the final decree. Besides, the rights of the present defendant, the supposed trustee, require that his alleged *cestui que trust* should be joined as party, in order that he may be protected by the decree in this suit from any further claim by the *cestui que trust* on account of the estate in case he is compelled to convey it to the plaintiffs. *Demurrer sustained.*

GEORGE B. RICHARDS & another *vs.* WILLIAM F. SMITH & Trustee.

On appeal to this court from a judgment of the court of common pleas, charging a trustee in foreign attachment, who has disclosed in his answer an assignment to a claimant, if the record does not show facts establishing the validity of the assignment, the judgment must be affirmed.

APPEAL by Henry M. Richards, summoned as trustee, and Jesse F. Richards, claimant, from the judgment of the court of common pleas, charging the trustee. The papers on which the case was submitted to this court consisted only of the claim of Jesse F. Richards of all moneys in the hands of the trustee, as having been assigned to him by the defendant on the 19th of April 1856, which was before the date of this process; and of the trustee's answer under oath, stating that at the time of the service of this process upon him a certain sum was due from

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him to the defendant, for which he had since given his due bill to Jesse F. Richards, upon the latter's presenting to him the following assignment: "In consideration of a debt I owe Jesse F. Richards, be it known that I, William F. Smith, of Attleborough, do hereby transfer and set over to said Jesse F. Richards all demands that I hold against Henry M. Richards, or that the said Henry M. Richards now owes me to this date, and I do empower the said Jesse F. Richards to collect the same. Dated this nineteenth day of April, 1856. W. F. Smith."

J. Daggett & C. B. Farnsworth, for the plaintiffs.

C. I. Reed, for the trustee and claimant. The facts show a valid assignment of the fund to the claimant. And if his claim is not properly before the court on this appeal, or even if he has failed to maintain his claim, the trustee is still entitled to be discharged on his answer. *Taylor* v. *Collins*, 5 Gray, 50, note.

By the Court. An appeal lies from the court of common pleas, only for error in law apparent on the face of the record. *St.* 1840, *c.* 87, § 4. And this record does not state facts enough to show either the claimant's right to the fund, or the trustee's right to be discharged. We must presume that evidence was not given to the court of common pleas, which proved the validity of the assignment to the claimant; or that other evidence was given, which showed that the assignment was invalid.

In the case of *Taylor* v. *Collins*, 5 Gray, 50, note, the trustee's answer disclosed a valid assignment for good consideration; the court of common pleas defaulted the claimant, but discharged the trustee; the plaintiff, by his appeal, opened the whole case in this court; and this court necessarily discharged the trustee.

Trustee charged.

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Charles D. Burt *vs.* John Perkins & another.

A payment by an insolvent debtor to a preëxisting creditor is valid, except as against proceedings in insolvency, although both parties know the debtor to be insolvent.

In an action by an attaching officer against a receiptor, the burden of proving that the property did not belong to the person as whose it was attached is upon the defendant.

An action by an attaching officer upon a receipt for certain property attached on mesne process, by which the receiptor agrees to keep and redeliver the property to the officer on demand, may be defeated by proof that it was not the property of the person as whose it was attached.

Action of contract upon a receipt by which the defendants acknowledged that they had "received of Charles D. Burt, deputy sheriff, for safe keeping," certain goods attached by him by virtue of a writ in favor of James E. Cooley against Perkins, Smith & Co., and agreed "safely to keep and redeliver all of said property above mentioned to said Charles D. Burt, on demand, in like good order and condition that the same now is, free from all expense to said Burt, or pay the said Burt the above named sum in cash, on demand, for value received."

Answer, that said goods were the property of John N. Barbour, and not the property of Perkins, Smith & Co., or of these defendants, or either of them; and that, long before any demand was made for the same by the plaintiff, the same were taken by Barbour into his own possession and custody as owner.

At the trial in the court of common pleas, before *Bishop, J.*, the plaintiff testified that "before Barbour took possession of the attached property, and for a long time after, no intimation was given to him that the property attached was claimed as the property of any other than Perkins, Smith & Co.; that the receipt was executed and delivered in the store in which the attached property was; and that thereupon the plaintiff abandoned his attachment, and delivered the property attached to the defendants, without having at any time removed the same from the store aforesaid; that due demand under the receipt was made upon the defendants, and they refused to deliver the property, or its agreed value." This evidence was not controverted by the defendants.

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John Perkins, one of the defendants, testified that "previously to the fall of 1852, the firm of Perkins, Smith & Co., of which he was a member, were engaged in the manufacture of paper hangings in New Bedford; that at that time, being much embarrassed and owing more than they could pay, but believing the business could be made profitable, they were desirous of connecting themselves with some party or parties who could furnish means to conduct the business; and Barbour, a silent partner in the firm of Banker, Carpenter & Co., to whom they were largely indebted, consented to take hold of the matter, if the title to all the property in the business should be vested in him, and he could have the management and control; whereupon a bill of sale of all the assets of Perkins, Smith & Co., amounting to about $7,500, was made to Barbour, which he paid for." It was conceded that a considerable portion of the proceeds of this sale was applied to the discharge of the indebtedness of Perkins, Smith & Co., to Banker, Carpenter & Co.; but it did not appear what portion.

Perkins further testified "that the property sold to Barbour was left in the possession of Perkins, Smith & Co., to be sold on Barbour's account; that the business was thereafter conducted under the name of John N. Barbour & Co., but there was no company, and that no partnership existed between Perkins, Smith & Co. and Barbour; that Perkins was to be paid by Barbour for his services at the store, by the day; and that Smith was to be paid by the day for his services at the factory; that, after this arrangement, all goods added to the stock in store were purchased on account and with moneys of Barbour, and said firm of Perkins, Smith & Co. continued to act merely as his agents, and, at the time of the attachment referred to, had no interest of any kind in any property in said store."

Barbour corroborated the testimony of Perkins, excepting that he testified that there was no agreement made as to the amount of the compensation of Perkins, Smith & Co.; and that Perkins, Smith & Co. were to receive compensation out of the profits of the business, and were to be liable for a portion of the losses.

Upon this evidence the plaintiff asked the court to instruct

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the jury, "that the payment of the proceeds of the property of Perkins, Smith & Co. to one of their creditors at a time when they were largely insolvent, and knew they were insolvent, and the preferred creditor knew they were insolvent, is a payment in fraud of the existing laws of the Commonwealth;" "that the burden of proving that the property did not belong to Perkins, Smith & Co. rested on the defendants;" and "that the plaintiff was entitled to a verdict, as matter of law, upon the evidence in the case that the property was attached in the store of Perkins, Smith & Co. as their property without objection, and was not removed by the plaintiff, and upon the delivery of the receipt was left by the plaintiff with the defendants, in the place where he found it; notwithstanding the jury should be of opinion that the property was not rightfully attached as the property of Perkins, Smith & Co."

But the court declined to give any of these instructions; the jury found a verdict for the defendants, and the plaintiff alleged exceptions.

J. C. Stone, for the plaintiff. 1. Payment by a debtor to his creditor when the debtor is insolvent, and they both know it, is in violation of the policy of the insolvent laws, and fraudulent.

2. The burden rested upon the defendants to sustain their allegation in avoidance of the plaintiff's claim, that the property attached was not the property of Perkins, Smith & Co., but belonged to Barbour.

3. It was not open to the defendants to avoid their contract by showing that Perkins, Smith & Co. were not the owners of the property attached, because the attachment was dissolved when the receipt was taken, and the property, except as between the creditor and the officer, was no longer to be regarded as in the custody of the law; the defendants became original contractors, and were bound by their undertaking to return the goods or their agreed value on demand, whether before or after judgment. *Donham* v. *Wild*, 19 Pick. 522. *Denny* v. *Willard*, 11 Pick. 519. *Wentworth* v. *Leonard*, 4 Cush. 414. *Hodskin* v *Cox*, 7 Cush. 471.

Even if the goods were delivered by the plaintiff to the de-

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fendants distinctly as the property of Perkins, Smith & Co., they delivered the same to an adverse claimant at their peril, unless they gave the plaintiff notice of such claim, in order that he might defend and protect his rights. *Wentworth* v. *Leonard*, 4 Cush. 414.

R. C. Pitman, for the defendants.

METCALF, J. It is no legal ground of exception, that the judge declined to instruct the jury, that payment by Perkins, Smith & Co., from the proceeds of their property, to Banker, Carpenter & Co., their creditors, was in fraud of the insolvent laws. Such instruction, if given, would have been idle, unless it had been followed by the further instruction that, by reason of such fraud on those laws, the sale of the property to Barbour, from which the proceeds which were paid to Banker, Carpenter & Co. were derived, was void as against Cooley, another creditor, for whom the plaintiff attached the same property — a doctrine for which there is no foundation in law. It is only when proceedings in insolvency are instituted against a party who has given a preference to one of his creditors over another, that such preference can be defeated on the ground of its being a fraud on the insolvent laws. *Eastman* v. *Eveleth*, 4 Met. 148, 149. In the present case, it does not appear that such proceedings have been instituted against Perkins, Smith & Co. And if they had been instituted, yet the assignee in insolvency could not recover back the money paid to Banker, Carpenter & Co. *Wall* v. *Lakin*, 13 Met. 167.

2. The instruction as to the burden of proving that the attached property did not belong to Perkins, Smith & Co. we think was wrong. That burden, under the defendants' answer, was on them. Their receipt and promise were *prima facie* binding on them, and it was for them to show that they were not thereby bound. *Powers* v. *Russell*, 13 Pick. 76, 77.

3. The defendants were rightly permitted to show that they were not bound by their receipt and promise, by proving that the property for which they gave their receipt, and which they promised to redeliver to the plaintiff, was not the property of the parties on whom the writ of attachment was served, and

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could not lawfully be applied to the payment of the attaching creditor's demand. This has been repeatedly decided. *Learned* v. *Bryant*, 13 Mass. 224. *Dewey* v. *Field*, 4 Met. 383. *Fisher* v. *Bartlett*, 8 Greenl. 122. The plaintiff also, if sued for not seizing the attached property on execution, might defend himself, by showing the same fact. *Fuller* v. *Holden*, 4 Mass. 498. *Cilley* v. *Jenness*, 2 N. H. 87. *Brydges* v. *Walford*, 6 M. & S. 42, and 1 Stark. R. 389, note. *Sawyer* v. *Mason*, 19 Maine, 49.

A new trial must be granted, in consequence of the misinstruction concerning the burden of proof.

Exceptions sustained.

LYMAN SNELL & wife *vs.* INHABITANTS OF WESTPORT.

Under *St.* 1856, *c.* 188, a wife is a competent witness in support of an action brought by her husband and herself jointly for a personal injury to her.

ACTION OF TORT, brought by Lyman Snell and Clarissa his wife for an injury sustained by her from a defect in a highway.

At the trial in the court of common pleas, early in June 1857, before *Bishop*, J., the wife was admitted, against the objection of the defendants, to testify as fully as if she had not been the wife of the other plaintiff; and was the only witness upon the amount of injury. The verdict was for the plaintiffs, and the defendants alleged exceptions.

J. C. Stone, for the defendants.

T. M. Stetson, for the plaintiffs.

DEWEY, J. This case having been tried before the *St.* of 1857, *c.* 305, went into operation, the right of Mrs. Snell, the wife, to testify, must depend upon the construction given to *St.* 1856, *c.* 188. The provisions of this act are general, authorizing "parties in all civil actions to testify in their own favor."

We have already decided that in an action commenced by the husband solely in his own right, and when the wife could not have been joined as a party, the wife was not by force of

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this statute made a competent witness for her husband. Upon what had heretofore been considered as satisfactory reasons for such exclusion, and finding no new provisions in the act enlarging the rule as it existed at common law, as to her competency, she was held to be properly excluded, when offered to support an action instituted solely by the husband. *Barber* v. *Goddard*, *ante*, 71.

But the case before us differs materially from the case alluded to. In the present case the wife is one of the parties to the suit. It being brought to recover damages for her personal sufferings, the action could only be brought in her name and her husband's as plaintiffs. So too the cause of action is one that would survive to her in case of her husband's death before judgment in the action. She is therefore really a party to the suit, in every sense required to bring her within the provisions of the *St.* of 1856, *c.* 188, and to make her a competent witness in the case. *Exceptions overruled.*

LORENZO D. DAVIS & others *vs.* DANIEL B. ALLEN.

An officer of a voluntary association, who has testified to what he knows of its expenses and management, cannot, for the purpose of refreshing his recollection, be shown an account book of the association, the entries in which he did not make, and does not know who did.

By the articles of a mining association formed in Massachusetts, to go to California, it was agreed that the association should buy a vessel, and furnish her with supplies "for the period of eighteen months from the day of sailing, for which term the company is to continue;" that the owners of each share should pay a certain sum to the treasurer, and either go on the expedition themselves or furnish substitutes; that each member or substitute who should go should have his board and medical attendance at the expense of the association, and should for said period of eighteen months devote himself to the service of the association, under the direction of its officers, and deliver to the treasurer all gold, money or other things obtained by him; that the business of the association should be managed by a board of directors; that the profits and the losses should be equally divided among the shares; that after arriving in California the affairs of the association should be stated monthly, "and a division of profits may be then made to such extent as may be decided by the vote of two thirds of the members and substitutes present and voting," provided that no substitute should receive more than the share stipulated for between him and the owner; that at the expiration of the eighteen months the association should by vote decide whether to return home, or extend operations for a limited period; and that "if at any time two thirds of the members present and voting shall decide to sell

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the vessel, &c., all owners shall be bound to join in the sale and conveyance; and, in all cases, the substitute shall have the same right to vote as his principal would have, and each share shall be entitled to one vote." A month after the arrival of the expedition in California, by direction of the officers of the association, and with the general assent of all the members and substitutes in California, the association was dissolved, the vessel and remaining outfits sold, and the profits divided by deducting all the expenses of the association from so much of the amount of the sale of the ship and outfits as equalled the original cost thereof, and dividing the residue of so much of that amount among the shareholders; and in the excess of such sale over the cost, and in the earnings of the association, giving each substitute one half of his principal's proportion. *Held*, that a substitute was entitled to hold the sum so distributed to him, as against his principal, by contract with whom he was to "receive two thirds of all property and sums to which" his "share should become entitled under said articles, until the association is dissolved," and agreed during the term of said association and during the time to which it might be extended to devote himself to its service, and comply with its regulations.

ACTION OF CONTRACT on an agreement under seal made at New Bedford on the 1st of March 1849, by which the plaintiffs covenanted and agreed that the defendant should "be permitted to and have the right to go in Schooner Emeline, on the contemplated expedition to California, as substitute for the party of the first part, and representative of one share of said schooner and outfits, with all the right of a substitute, as set forth in the constitution and by-laws of the New Bedford and California Mining Association," (the material parts of which are copied in the margin,*) and "that, in consideration of the ser-

* The subscribers hereby associate themselves together for joint operations, under the name of the New Bedford and California Mining Association. The object of the association is an expedition to California in pursuit of gold, to be procured by mining or washing, or by other means and employments, as may be found expedient. The company shall buy the schooner Emeline, of New Bedford, and furnish her with provisions, and other things necessary for the support and comfort of the members of the company, and substitutes, for the period of eighteen months from the day of sailing from New Bedford, for which term this company is to continue.

Each of the subscribers owns the number of shares set against his name, and for each share shall, as the company may direct, pay into the treasury the sum of three hundred dollars. Each owner shall go on said expedition himself, or for each share owned by him shall furnish a substitute, to be approved by the company.

Each member who goes in the vessel, and each substitute, shall, during the term of this association, have his board and medical attendance at the expense of the company; and shall, from the time of leaving New Bedford to the end of eighteen months therefrom, devote himself with his best skill and ability to the

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vices to be rendered by said Allen, according to the terms hereafter set forth, the said Allen shall be entitled to receive, and

service of the company, and in every way in his power promote its interests, under the direction of its officers, and shall faithfully report and deliver to the treasurer, as soon as received, all gold, money, or other things obtained by him; and no member or substitute shall hold anything which he may obtain or earn, to his own use, nor engage in any business or enterprise, except for the use and benefit of the company.

The company shall, at convenient time, by ballot, choose a president, secretary, and three directors, who shall direct and manage the business of the company, and be called the board of directors.

Each share shall be entitled to an equal division of profits, and bear an equal proportion of losses. The sickness of any member or substitute shall not diminish the profits of the share owned or represented by him, unless such sickness shall be occasioned by immorality, in which case it shall work such forfeiture as the company by a vote of two thirds may decide.

In case any member or substitute shall die during the continuance of this association, his legal representatives shall be entitled, on the winding up of the company, to receive the same share that such person would have been entitled to, if living; equity being observed between the principal and substitute, in case of the death of a substitute.

If any owner of a share shall fail to go in said vessel when ready for sea, or to furnish a suitable substitute for each share owned by him, such owner shall forfeit said share to the company. If any member shall desert the company, he shall forfeit his share to the company. If any substitute shall desert the company, he shall forfeit all his interest in the earnings of the company by his agreement with his principal, and the owner of the share shall have no interest in the earnings after such desertion.

In case of any disagreement or misunderstanding between members or substitutes, the same shall be referred to the board of directors, and their decision shall be final.

A statement of the affairs of the company shall be made on the first Monday of each month, after arriving in California, and a division of profits may be then made to such extent as may be decided by the vote of two thirds of the members and substitutes present and voting; and the treasurer shall take receipts and keep regular accounts of the amounts paid to each; provided, that no substitute shall receive any more than the share stipulated for between him and the owner, unless by virtue of a special power of attorney, and the balance shall be kept with reasonable care, for the owner of the share.

At the expiration of eighteen months from the time of sailing from New Bedford, the company shall, by vote, decide whether to return home, or extend operations for a limited period. If a majority shall decide to come home in the

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shall receive, two thirds of all property and sums to which one share represented by said Allen shall become entitled under said constitution and by-laws, until the association and company is dissolved; and the said Allen assents to the above terms, and hereby covenants and agrees with said party of the first part, that he will, as such substitute, go in said vessel when ready for sea, and during the term of said association, and during the time to which it may be extended, will devote himself faithfully to the trust, and use his best skill and ability to the service of said association, and in all respects comply with the regulations of the association, constitution and by-laws of said company, and hold himself subject to their penalties."

At the trial in the court of common pleas before *Sanger*, J., there was evidence that the plaintiffs were joint owners of one share in the association, from its beginning to its dissolution; that the shareholders paid $312 per share for the purchase of the Emeline and outfits, taking bills of sale of fractional parts of the vessel; that the vessel sailed on the 18th of March, and arrived at San Francisco on the 16th of September, and the greater portion of the members of the company arrived at the mines about the 5th of October 1849, carrying with them some of the provisions from the vessel; that about four weeks after-

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vessel, that shall be decisive, and division of the property, except vessel and outfits for the homeward voyage, may be made, or the division may be deferred until arrival at New Bedford. If, in such case, any individual shall desire to remain in California, he may do so on such terms as a majority shall decide, and not otherwise. If a majority shall decide to stay for a definite period, the company shall do so; provided, however, that they shall pay to such members as wish to withdraw a fair value for their interest in vessel and property on board, which value shall be decided by three persons, one chosen by the majority, one by the minority, and the third by those two; and such persons shall, upon receiving said award, convey their interest in the vessel, &c., to the other members.

If at any time two thirds of the members present and voting, shall decide to sell the vessel, &c., all owners shall be bound to join in the sale and conveyance. In all cases, the substitute shall have the same right to vote as his principal would have, and each share shall be entitled to one vote.

All members and substitutes shall obey the officers of the association, for the time being, and such subordinate officers as may be appointed by them.

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wards the association was dissolved, because all the members and substitutes in California thought best for the association to break up; that the defendant did all that the contract required him to do, and the association was broken up without his fault or procurement, although he was in favor of its being broken up; and that after the dissolution of the company the defendant busied himself no farther about the affairs of the company or of the plaintiffs.

It also appeared that the gross amount of gains of the company (other than those resulting from sales of ship and outfits) was less than $1000; that the expenses of the association to the time of its dissolution were about $4000, of which $2000 were paid for a house lot in Sacramento; that before the dissolution the Emeline and the remaining outfits were sold at an advance over their cost by a vote of the association, and under the direction of the directors and other officers of the association, and a division made, under such direction, and with the general assent of all the members and substitutes then in California, as follows: There were two accounts kept. One, called "Company Account," was credited with so much of the accounts of sales of ship and outfits as equalled the cost price of the same, and was charged with all the expenses of the association, and the balance was divided among the shareholders. The other account, called "Stock Account," consisted of the earnings of the association, and of the excess of sales over cost prices of ship and outfits, and was charged with no company expenses, and in the balance each substitute received half of his principal's proportion, and the other half was remitted to the shareholder. The amount thus paid to the defendant was the sum now sued for.

A witness, who was a director of the company in California, testified that he had knowledge of the expenses and management of the financial affairs of the concern; and was permitted to testify so far as his knowledge went. In order to refresh his memory as to the items of expense, the plaintiffs proposed to show him a book purporting to be the "Expense Account" of the association, for the purpose of afterwards asking him to

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testify from his own recollection as to items of expense. But the book was not in the handwriting of the witness, nor was any entry in it made by him, nor did he know who made the entries, nor did it appear whence the book came. And the judge did not allow the book to be so used by the witness.

The plaintiffs requested the court to give the following instructions to the jury:

"1st. That if the jury found the expenses of the company to exceed the gains, (other than from sales of ship and outfits,) then no such profits, property or sums came to the concern as the substitutes were entitled to a share in, even on full performance of the contract and continuation with the company for eighteen months; and especially so in case the company dissolved before the expiration of eighteen months.

"2d. That if the company broke up before the term of eighteen months, the ship and outfits, and their proceeds, belonged to the shareholders, and the substitutes were entitled to no share in them.

"3d. That this substitute, upon the contract, would be entitled to no part of the money due to the share represented by him unless the company lasted eighteen months.

"4th. That, upon the contract, neither the company nor any of its officers had any authority, previously to the expiration of said eighteen months, to adjust and pay any of the proceeds of the vessel and outfits to this substitute, in such a way as to bind these defendants.

"5th. That even if the excess of sales over cost of ship and outfits could be considered profits, property or sums in which the substitutes had any interest in any event, yet that the expense of the association should have been charged to that fund, so as to leave the net amount, instead of the gross amount, as the fund in which the substitutes had rights."

The court declined to give the jury any of these instructions; but did instruct them that "it was competent for the association, under the constitution and by-laws, by a vote of two thirds of the members and substitutes present and voting, to decide what should be divided as profits, and to which account the expenses

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should be charged; and that if by such a vote the expenses were charged to the company account, they were rightly so charged; and if by such a vote the gross excess of sales over cost of ship and outfits was divided as profits, giving the substitutes an interest therein, it would be a correct division; that the expenses were rightly charged to the company account; that the gross excess of sales over cost of ship and outfits was rightly divided, giving the substitutes an interest therein; that under the contract with the plaintiffs, the defendant was entitled to two thirds of the profits, made up as aforesaid, accruing to the plaintiffs' share, which the defendant, as their substitute, represented, and this, though the association was dissolved before the expiration of the eighteen months; that if the amount shown to have been received by the defendant was less than such two thirds, the plaintiffs could recover nothing; if it was greater than such two thirds, the plaintiffs could recover such excess." The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

T. M. Stetson, for the plaintiffs, cited *Rice* v. *Dwight Manuf. Co.* 2 Cush. 87; *Davis* v. *Maxwell*, 12 Met. 290; *Stark* v. *Parker*, 2 Pick. 267; *Olmstead* v. *Beale*, 19 Pick. 528; *Adams* v. *Nichols*, 19 Pick. 275; *Harrington* v. *Dennie*, 13 Mass. 93; *Brown* v. *Harris*, 2 Gray, 360; 1 Parsons on Con. 519, 522 & note; *Cutter* v. *Powell*, 2 Smith's Lead. Cas. 1, & notes; Story on Con. § 141; Chit. Con. (8th Amer. ed.) 59; 1 Greenl. Ev. §§ 436, 437, & cases cited.

J. F. Dearborn, for the defendant, cited *Field* v. *Woodmancy*, 10 Cush. 427.

By the Court. The book offered as a memorandum to refresh the recollection of the witness was rightly excluded from his inspection. Inasmuch as he had never seen it before, it could not be the means of reviving his memory of past transactions. It was in effect nothing but a method of suggesting to him the fact concerning which he was called to testify, and does not come within any of the tests by which the use of memoranda to aid the recollection of a witness is regulated and governed. 1 Greenl. Ev. §§ 436–439.

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The contract by which the mining association was created, and under which the defendant served as a substitute for the plaintiffs on the voyage to California and after the arrival of the company in that country, is obscure and indefinite in its provisions; but upon careful consideration we are of opinion that the construction put upon them by the court below was correct.

Exceptions overruled.

ERNEST CARET *vs.* HORATIO FIELD.

A negotiable promissory note, given for intoxicating liquors sold in this commonwealth contrary to *St.* 1852, c. 322, is valid in the hands of one who took it before maturity, for a valuable consideration, and without notice of the illegality, notwithstanding the provision of § 19 of that statute, declaring that all payments and compensations for intoxicating liquors illegally sold "shall be deemed to be received in violation of law, without consideration, against law, equity and good conscience."

ACTION OF CONTRACT on a negotiable promissory note, made at Taunton, on the 17th of October 1854, payable to Orringe D. Day or order, and by him indorsed to the plaintiff, a merchant in New York. The consideration of the note was intoxicating liquors sold by Day to the defendant in this commonwealth contrary to *St.* 1852, *c.* 322. But the note was indorsed to the plaintiff before it was due, for a valuable consideration, and without notice of the original unlawful contract. The case was submitted to the decision of the court upon the foregoing facts, and others not material to the understanding of the point decided.

C. I. Reed, for the plaintiff.

E. H. Bennett, for the defendant. A note, made void by statute, is void, even in the hands of a *bona fide* holder. *Bowyer* v. *Bampton*, 2 Stra. 1155. *Lowe* v. *Waller*, 2 Doug. 736. *Unger* v. *Boas*, 11 Penn. State R. 601. So is a note made void by the common law, such as a note given to compound a felony. *Bell* v. *Wood*, 1 Bay, 249. A statute may make a note void by necessary implication, as well as by express words. Story on

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Notes, § 192. *Territt* v. *Bartlett*, 21 Verm. 184. On this principle, notes made on Sunday have been held void in the hands of an indorsee. *Allen* v. *Deming*, 14 N. H. 133. *Goss* v. *Whitney*, 27 Verm. 272. *Pattee* v. *Greeley*, 13 Met. 284. The St. of 1852, *c.* 322, § 19, declares that "all payments or compensations for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered to have been in violation of law, without consideration, and against law, equity and good conscience." These words are equivalent to the word "void." The object of the statute is not merely to protect the purchaser, or even to punish the seller, but to discourage the traffic; and this object would be evaded by allowing the purchaser indirectly to receive the price of the liquors by negotiating the note to a third person.

Shaw, C. J. The question in this case is, whether, upon this note given for the price of liquors sold here in violation of the law of this commonwealth, the plaintiff, having taken it with no notice of the illegality, can maintain this action, and we are all of opinion that he can.

The principle upon which this defence is authorized is that a party cannot recover who is in the wrong himself. It is sometimes said that he cannot give a better title than he himself holds. But this is not true. In the case of a conveyance of real estate to defraud creditors, the grantee cannot hold, but one who takes it from him without notice may. But the law goes further in favor of commerce, and gives a high degree of character and honor to bills of exchange and promissory notes in the hands of an indorsee without actual or constructive notice of anything affecting their validity or credit. If he takes it overdue, that should put him on inquiry why it had not been paid. And it must be taken in the ordinary course of business, and not under unusual circumstances.

This general rule is taken with some exceptions. The provisions of some statutes against usury and gaming made notes given in violation of the statute void, even in the hands of an indorsee. *Kendall* v. *Robertson*, 12 Cush. 158. *Bowyer* v. *Bampton*, 2 Stra. 1155. But in those cases the statute declared

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that the note should be absolutely null and void, to all intents and purposes, or, as is sometimes said, applied to the contract and not to the party. Without citing numerous authorities, the recent case of *Williams* v. *Cheney*, 3 Gray, 222, is precisely in point. *Judgment for the plaintiff.*

JEAN H. C. SISTERMANS *vs.* HORATIO FIELD.

Whether describing the plaintiff in a writ by no other Christian name than "H." is bad on demurrer — *quære.*

A declaration, which alleges that the defendant made a promissory note to his own order, and indorsed it in blank, and owes the plaintiff the amount of it and interest, is bad on demurrer, for want of any statement of the plaintiff's title.

Upon proof that a promissory note is founded in illegality, or was obtained or put in circulation fraudulently, an indorsee, before he can recover upon it, must show that he gave value for it.

ACTION OF CONTRACT. The plaintiff was originally described in the writ as "H. Sistermans." The declaration was that "the defendant made three several promissory notes payable to his own order, which the defendant indorsed in blank, a copy of which notes with the indorsements thereon is hereto annexed; and the defendant owes the plaintiff the amount of said notes and interest thereon." Annexed were copies of three notes corresponding with the description.

The defendant demurred to the writ and declaration, for the following causes: "First. Because the plaintiff is not properly and sufficiently described in said writ and declaration. Second. Because the plaintiff does not aver that he is the holder or indorsee, or in any way interested in the notes described in said declaration."

E. H. Bennett, for the defendant. The practice act makes it the duty of the court so to construe the pleadings "as to secure, as far as possible, substantial precision and certainty, and to discourage vagueness and loose generalities." *St.* 1852, *c.* 312, § 26.

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1. The declaration is defective in not giving the plaintiff's Christian name, or, at least, stating that he has no other name than the initial given. 1 Chit. Pl. (10th Amer. ed.) 256 & *note*. Steph. Pl. (1st Amer. ed.) 319. *Wilson* v. *Shannon*, 1 Eng. 196. And this may be taken advantage of by demurrer. *Kinnersley* v. *Knott*, 7 C. B. 980. *Miller* v. *Hay*, 3 Exch. 14. *Levy* v. *Webb*, 9 Ad. & El. N. R. 427.

2. The declaration does not aver that the plaintiff is the holder of the notes in suit, or that he is any way interested therein. The general averment at the end of the declaration is of a mere inference of law, and does not cure the defect. *Millard* v. *Baldwin*, 3 Gray, 484.

J. Brown, for the plaintiff. 1. A defective description of the plaintiff is no cause of demurrer. It is a question of fact, not of law. That "H. Sistermans" does describe the plaintiff is a fact to be established by evidence, if the pleadings properly put it in issue. Suppose his first name were "Aitch," "H." would be *idem sonans*.

2. "Only the substantive facts necessary to constitute the cause of action need be stated, without unnecessary verbiage, and with substantial certainty." St. 1852, c. 312, § 2, *cl.* 3. A cause of action against the defendant is stated with substantial certainty by the declaration and copy of the notes. The averment that "the defendant owes the plaintiff the amount of said note and interest thereon" necessarily includes an averment that the plaintiff is the holder of the notes, for without that the defendant would not owe him.

Upon this declaration and demurrer "the person and case may be rightly understood by the court," and the declaration may be amended, if necessary. Rev. Sts. c. 100, §§ 21, 22.

Shaw, C. J. The court are all of opinion that the declaration is bad. It is necessary, even under the practice act, to set forth all the facts necessary to constitute the cause of action. This declaration would as well show a cause of action in another as in the plaintiff. He does not aver any transfer or indorsement to, or title or possession in himself. And this form is not authorized by the forms annexed to the practice act. If

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this case was to come on for trial, the plaintiff would be obliged to produce the note, and, when produced, it would be *prima facie* evidence. But before he comes to that, he must amend his declaration.

We have not thought it necessary to decide whether the want of a full name is a cause of demurrer; for if the plaintiff moves to amend, he may amend in both respects. If it were necessary to decide this point, the English cases would need more careful consideration; for in some respects the English practice differs from ours. Even the legislature, we believe, in changing the names of persons, has given names with only a letter of a middle name. But this is not of much practical importance, and we intimate no opinion upon it.

Declaration adjudged bad; but amendment allowed.

The plaintiff then amended his writ by inserting his full name; and his declaration, by counting on the notes separately, each of which was dated September 4th 1855, and averring in the count on each note that he was the holder thereof.

The defendant, in his answer, "denies that he ever made any of the notes set out in the declaration, and indorsed the same to the plaintiff as alleged. But the defendant admits that he gave three notes, of the same tenor and date as those set forth in the declaration, to the firm of Fletcher & Davis, in payment for spirituous and intoxicating liquors sold by them to the defendant, contrary to law; but whether the plaintiff is the holder of said notes, or how he came by them, if he is the holder, and what consideration, if any, he paid for them, the defendant declares his ignorance, and leaves the plaintiff to prove the same. But the defendant says he is informed, and believes, that if the plaintiff is the holder of said notes, he took them after they were due, and with notice of the illegal consideration for which they were given, either express or implied by law."

A trial was had at April term 1858 before *Metcalf*, J., who made the following report thereof for the decision of the full court, before whom the arguments were made thereon at October term 1858.

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"The signatures of the defendant, on the face and back of the notes, were not denied by him, and the notes were read in evidence, and the plaintiff rested his case.

"The defendant testified that he did not know the plaintiff, and never had any business with him; that he gave the notes to the firm of Fletcher & Davis, of Boston, liquor dealers, in payment for domestic and other liquors sold by them to him, to be retailed by him in Taunton, where he had been in the liquor business about twenty years; that when he bought these liquors he had no authority to sell them, and never had such authority since; that said Fletcher & Davis had been in the liquor business, in Boston, about three years, and that the liquors were by them sold to him there and in Taunton, a few months before the date of the notes. No evidence was offered by the plaintiff to control this testimony of the defendant.

"The defendant's counsel asked the court to rule 'that if the illegality of the consideration of the notes was admitted or proved, it was incumbent on the plaintiff to give some evidence how he came by the notes, and that he paid a consideration for them.' But the court declined so to do.

"The defendant's counsel also asked the court to rule 'that the plaintiff could not recover, upon the testimony of the defendant, if believed, on the declaration in the case.' But the judge declined so to do.

"The court instructed the jury that the possession of the notes by the plaintiff was sufficient evidence of his right to maintain this action, if not controlled by rebutting evidence; that unless the defendant gave evidence that the plaintiff received the notes after they fell due, or had notice, when he received them, of the illegality of the consideration for which they were given, he was entitled to a verdict. The jury returned a verdict for the plaintiff."

Bennett, for the defendant. The notes in suit were given in payment for liquors sold to the defendant by Fletcher & Davis, the original holders, contrary to *St.* 1855, *c.* 215. They were therefore entirely null and void in their hands. *Perkins* v. *Cummings*, 2 Gray, 258.

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Being void and worthless in the hands of the original holders, it is presumed they will pass them into other hands for the mere purpose of collection, and without the payment of a consideration therefor. Parke, B. in *Bailey* v. *Bidwell*, 13 M. & W. 76. It was therefore "incumbent on the plaintiff to give some evidence that he paid a consideration for the notes," which the court declined to rule.

This burden has been held to rest on the plaintiff whenever the maker of the note proves, (1.) That the note has been lost or stolen from him. *Miller* v. *Race*, 1 Bur. 452. *Grant* v. *Vaughan*, 3 Bur. 1526. *Peacock* v. *Rhodes*, 2 Doug. 633. (2.) That it was obtained from him by fraud or duress. *Duncan* v. *Scott*, 1 Campb. 100. *Rees* v. *Headfort*, 2 Campb. 574. (3.) That it was wrongfully put in circulation by the payee, or original holder. *Smith* v. *Braine*, 16 Ad. & El. N. R. 244. *Harvey* v. *Towers*, 6 Exch. 656. *Catlin* v. *Hansen*, 1 Duer, 309. *Aldrich* v. *Warren*, 16 Maine, 465. *Perrin* v. *Noyes*, 39 Maine, 384. *Munroe* v. *Cooper*, 5 Pick. 412. *Bissell* v. *Morgan*, 11 Cush. 198. *Fabens* v. *Tirrell*, Suffolk, March 1852, 15 Law Reporter, 44. (4.) When it is proved or admitted that the note was given for an illegal consideration. *Paton* v. *Coit*, 5 Mich. 505. *Bailey* v. *Bidwell*, 13 M. & W. 73. *Fitch* v. *Jones*, 5 El. & Bl. 238. *Bingham* v. *Stanley*, 2 Ad. & El. N. R. 117. *Gwyn* v. *Lee*, 1 Maryland Ch. 445. Story on Notes, § 196. Byles on Bills, 188, 190. Edwards on Bills, 686, 687.

The reason is, that the holder can recover only what he has in fact paid — no more and no less — this makes him whole, and relieves the defendant from paying an illegal demand. *Allaire* v. *Hartshorne*, 1 Zab. 665. *Williams* v. *Smith*, 2 Hill N. Y. 301. *Edwards* v. *Jones*, 7 Car. & P. 633. *Holeman* v. *Hobson*, 8 Humph. 127. *Valette* v. *Mason*, 1 Ind. 288. *Jones* v. *Hibbert*, 2 Stark. R. 304. This divisibility of a promissory note, allowing the plaintiff to recover only such portion thereof as he proves himself justly entitled to, is a well settled rule in Massachusetts. *Stoddard* v. *Kimball*, 6 Cush. 469. *Bond* v. *Fitzpatrick*, 4 Gray, 89. *Chicopee Bank* v. *Chapin*, 8 Met. 40. This rule ought to apply to notes given in violation of law, as were the notes now in suit.

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The plaintiff could not recover, under his present declaration, if the testimony of the defendant was true, which was not rebutted by the plaintiff. The declaration averred an indorsement by the defendant to himself. This the defendant negatived. The indorsement was in blank, and had the note been payable to a third person, his blank indorsement would of course have been sufficient, as the plaintiff might have filled it up to himself at the trial.

But these notes were all payable to the maker's own order; they had no validity therefore until indorsed by the maker and payee; and to constitute an indorsement by the defendant to the plaintiff, as alleged, a delivery by him to the plaintiff was essential; but this fact was wanting. The plaintiff did not therefore prove an essential allegation in his declaration, viz. an indorsement by the defendant directly to himself. *Hooper* v. *Williams*, 2 Exch. 21. *Brown* v. *De Winton*, 6 C. B. 336.

Brown, for the plaintiff. No defect or infirmity of consideration, either in the creation, or in the transfer of a negotiable security, can be set up against a mere stranger to the transaction, such as a *bona fide* holder of the bill or note, who received it for a valuable consideration at or before it became due, and without notice of any infirmity therein. 2 Greenl. Ev. § 171. *Cazet* v. *Field*, *ante*, 329.

The holder of a negotiable paper indorsed in blank, is presumed to be the holder for consideration. With this presumption the burden of proof is on the defendant not only to show illegality of consideration, but also some facts or circumstances such as would have put the plaintiff on his guard. 1 Parsons on Con. 206. 2 Greenl. Ev. § 172. A blank indorsement is sufficient, *prima facie*, to convey a title to the actual holder, and has the same effect as an indorsement by the payee of a note payable to him or order. 2 Greenl. Ev. § 168. 1 Parsons on Contracts, 205, 206, 209 & notes.

Metcalf, J. The court are all of opinion that the first ruling, which the defendant's counsel asked for, ought to have been made, and that the instructions given to the jury were wrong. The following authorities (and many others) support the posi-

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tion, that upon proof that a promissory note is founded in illegality, or was obtained or put in circulation fraudulently, an indorsee, before he can recover in a suit upon it, must show that he gave value for it; and that it is not first incumbent on the defendant to show the contrary. *Bailey* v. *Bidwell*, 13 M. & W. 76. *Smith* v. *Braine*, 16 Ad. & El. N. R. 244. *Berry* v. *Alderman*, 14 C. B. 95. *Harvey* v. *Towers*, 6 Exch. 660. *Fitch* v. *Jones*, 5 El. & Bl. 238. *Catlin* v. *Hansen*, 1 Duer, 323. *Perrin* v. *Noyes*, 39 Maine, 384. *Paton* v. *Coit*, 5 Mich. 505. *Gwyn* v. *Lee*, 1 Maryland Ch. 445. *Munroe* v. *Cooper*, 5 Pick. 412. In the first of the foregoing cases, Baron Parke said: "If the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it; and such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value." *New trial granted.*

EBENEZER WRIGHT *vs.* JOSEPH B. MORSE.

Parol evidence is inadmissible, even between the original parties to a promissory note, to shew that a person not the payee, whose name was signed on the back of the note, signed it as guarantor only, or upon a condition which has not been performed.

ACTION OF CONTRACT on a promissory note, payable on demand to the plaintiff or order, and signed upon its face by Henry F. Ripley, and on its back by the defendant. Answer, want of consideration; and that the defendant never made or indorsed the note, as alleged by the plaintiff.

At the trial in the court of common pleas, the plaintiff called one witness who testified that "a short time after Ripley signed the note, the defendant took the note from Ripley, and put his name upon the back of it, and it was then delivered to the plaintiff." The plaintiff then rested his case.

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The defendant then offered to show "that at the time the defendant signed the note declared on, it was agreed by the plaintiff and defendant that if Ripley should arrive safely in California, the defendant was to be released, and the plaintiff was not to look to the defendant for the payment of said note; that the defendant was only as a guarantor; that if Ripley should arrive safely in California, then the plaintiff was to get his pay of Ripley."

The plaintiff objected to the testimony, as incompetent to control the written contract or note. *Sanger*, J. sustained the objection and rejected the testimony. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

E. L. Barney, for the defendant. The evidence rejected was competent to prove that the defendant never made the note in manner and form as the plaintiff had declared; and to show, as between the original parties, what the real transaction was; and to explain the contract, by showing how the blank above the defendant's name should be filled up. *Riley* v. *Gerrish*, 9 Cush. 104.

O. Prescott, for the plaintiff.

Dewey, J. The defendant, by putting his name on the back of the note, simultaneously with the signature by Ripley on the face of the note, and before it was passed to the payee, has, as has been repeatedly held by this court, placed himself in the situation of an original promisor, and is liable in every respect as such to the payee of the note. *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Met. 504, and cases there cited. And as such original promisor he is deemed in law to participate in the original consideration, and to be liable without any new or further consideration. *Samson* v. *Thornton*, 3 Met. 275.

It appearing in the present case that this instrument was thus signed by the defendant simultaneously with its execution by Ripley, and before the delivery of the note to the payee, it assumes, as respects the promisors, the character of other promissory notes. Any competent evidence of the failure of consideration, illegality in the contract, or other ground of defence, that would be open to the defendant in a suit against him upon an

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ordinary note signed on its face, would be equally open to him in the present case.

But oral evidence is not to be introduced by such party, to vary and control the written promise contained in the note itself; as to show that the note was not to be paid according to its tenor; or that, although absolute on its face, yet it was given upon a condition, and to be void or not payable upon the happening of some future event; thus making an absolute promise a qualified or conditional one. If anything is settled by repeated decisions of this court it is that oral evidence cannot be admitted to alter or vary a written contract, nor to annex thereto a condition or defeasance not appearing on the contract itself.

Nor is this rule rejecting oral evidence in such cases confined to negotiable notes, transferred before due, and in the hands of other parties than the original payee. The cases where it has been applied most frequently by this court have been cases between the original parties. *Hunt* v. *Adams*, 7 Mass. 518. *Adams* v. *Wilson*, 12 Met. 138. *Underwood* v. *Simonds*, 12 Met. 275. *Hanchet* v. *Birge*, 12 Met. 545.

The case of *Riley* v. *Gerrish*, 9 Cush. 104, is much relied upon by the defendant as an authority for introducing oral evidence in a case where the signature of the second promisor is on the back of the note. It is true that some of the remarks in the opinion given in that case, taken abstractly and without reference to the facts of the case and the real point in controversy, would seem to support the views here taken by the counsel for the defence. It becomes necessary therefore to look at the facts in that case, and the point upon which questions of law were raised. It will appear from the facts stated in the report of that case that the plaintiff sought to charge the defendant as an original promisor. The defendant denied this form of liability, contending that it was only that of an indorser, that purpose being indicated by him in writing in connection with his signature. The note was payable to the order of the plaintiff, and signed on its face by William Canney, and on the back the name of the defendant written in blank, except that above it the word "indorser" had been written, and subse-

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quently erased. The plaintiff attempted to explain the erasure, and to show that it was done lawfully and before the note passed to him as his property; and the whole question was as to the competency of oral evidence to show that the defendant when he signed the note wrote the word "indorser" over his name, but, the plaintiff refusing to accept the note in that form, that word was by consent of the defendant erased before delivery of the note to the plaintiff, and the note actually passed to the plaintiff with the word "indorser" erased. The only point in which the case can be deemed a judicial authority as to the competency of oral evidence, is that oral evidence may be admitted to explain the circumstances under which an erasure was made, or, in other words, to show whether it was made before or after the delivery of the note, and whether it was authorized by the party, and by proof of such facts to change or affect the relation of the party as an original promisor. In this respect the case was very like that of *Austin* v. *Boyd*, 24 Pick. 66, where such evidence was allowed to be competent to explain an erasure of the payee's name that had been indorsed on the back by mistake, in such manner as would have shown the defendant in the action to stand in the relation of a second indorser merely. In that case, while such evidence was held admissible to explain the erasure, it was very carefully stated by the court that the evidence was not offered to control or vary a written contract, but to account for a fact which might otherwise affect the note.

In cases of notes signed, as the present was, by the party on the back of the note, it is competent to show by parol evidence that the signature was placed there after the note had passed to the payee, and thus established the relation of guarantor and its liabilities only, which may materially affect the rights of the parties; but the fact that the signature of the defendant was made simultaneously with the other signature, and before the note was delivered to the payee, being uncontroverted, the liability of the party as an original promisor results therefrom, and exists in the absolute form indicated on the the note itself, and is not to be controlled or varied by oral testimony of a conditional liability. It was not therefore competent in the present

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case to show by oral evidence that it was agreed between the plaintiff and defendant that if Ripley, the other signer, should arrive safely at California, the defendant was to be released from all further liability, and the plaintiff was not to look to them for the payment of the note. The proposed evidence was therefore properly rejected. *Exceptions overruled.*

John C. Haskell & wife *vs.* County Commissioners of Bristol.

A petition, presented to the board of aldermen of a city for the location of a new road, was referred to the usual committee, who reported in its favor with an order requesting the superintendent of streets to lay out the road agreeably to the petition, by putting down metes and bounds, and to report to the board, which he did. The mayor and aldermen went upon the ground, in compliance with an order instructing the city clerk to so notify the owners of the land over which the road was supposed to run; examined the metes and bounds; found that they were correct, and that no one was present to object to the laying out, except claimants of damages; and recommended the adoption of an order accepting the road as a highway, which order was referred to a joint committee of the city council, and on their report passed, locating the way by metes and bounds, but in one portion "allowing for necessary curves between the monuments placed by the superintendent of streets." The road was constructed accordingly, with some alterations made by agreement with abutters. More than a year afterwards the board of aldermen, without any new petition being filed, ordered the superintendent of streets to make an additional return in conformity with those alterations, and he made a return following the line of the road as constructed, and the board of aldermen passed an order accepting that road as a highway. *Held*, that a petition for damages by an owner of land not affected by the alterations should have been presented within a year from the original laying out.

A city, that has taken land and actually constructed a highway over it, cannot object that no notice was given of the purpose to locate; nor that the names of the owners of the land were not stated in the laying out.

Thomas, J. This is a petition for a mandamus to the county commissioners to issue a warrant for a jury to assess the damages alleged by the petitioners to have been sustained by them by reason of the laying out of a way, called Clark's Point Road, by the city of New Bedford, over the land of the petitioners.

The answer of the commissioners admits the filing of a petition for a warrant on the fourth Tuesday of March 1856; that

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notice of such petition was served upon the city of New Bedford; that the parties appeared before them; and proceeds to state that the commissioners found that the way in question was laid out on the 13th of June 1853, more than a year before the filing of the petition for a warrant; that the proceeding of the city in May 1855, which the petitioners relied upon as the laying out of said way, was but an alteration of the line of the road at points distant from the land of the petitioners, and which in no way affected it; so that under neither the laying out in 1853 nor the alteration in 1855 were the petitioners entitled to damages; not as to the first, because their petition was not filed in time; not as to the second, because the alteration was not upon the land of the petitioners, nor in any way touched their interests.

The parties have agreed upon certain facts, to wit, that the road known as Clark's Point Road was laid out and adopted by the city of New Bedford in June 1853; that it was laid out over the land of the petitioners; that no petition for a jury to assess damages was made within one year from the laying out; that the road was again laid out by the city and accepted in May 1855, according to the records annexed; that there was then no alteration of the line of the road over the land of the petitioners, but that the second laying out covered the same land of the petitioners which was covered by the first laying out; that the petitioners have never received any compensation under either laying out, and that the land of the petitioners was on the east side.

We are of opinion that if the way was so laid out in 1853, that the petitioners, under the laying out then made, were entitled to their damages, they cannot now have them; because, upon such laying out, the statute of limitations began to run, and the right is now barred; and because under the subsequent proceedings no new damage was sustained nor any old right revived.

We are then to inquire what was done in 1853. There was a petition to the board of aldermen for laying out a road around Clark's Point from Gifford's Barn to Cove Street. It

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was referred to the committee "on laying out and widening streets." That committee reported in favor of laying out, with an order requesting the superintendent of streets to lay out a road around Clark's Point, agreeably to the petition, by putting down metes and bounds; and to report to the board of aldermen. The superintendent of streets reported to the mayor and aldermen a laying out of the street, giving the line on the water by stone monuments, and the other line as eighty feet eastwardly from the first. An order was adopted to notify abutters of a time when the mayor and aldermen would be upon the road for the purpose of laying it out as a public highway. The mayor and aldermen went upon the ground, "in compliance with an order instructing the city clerk to notify the owners of the land through whose estate said road was supposed to run, examined the metes and bounds thereof as put down by the superintendent of streets, and found them correct, and none present to object to the laying out of the street," except certain persons claiming damages, not including the petitioners. Upon their return they recommended the adoption of an order accepting the Clark's Point Road as a highway. This was on the 6th of June 1853. The order was referred to the joint standing committee on roads, who reported that the order ought to pass, and on the 13th of June 1853 the report was accepted in concurrence and the order adopted.

That order was as follows: "Ordered, That Clark's Point Road from a stone monument in the south line of Cove Street and west line of South Water Street, south one degree west forty eight and sixty six one-hundredth rods, to a stone monument placed in the north line of Pardon Gifford's, west of his barn; thence south ten degrees east, sixteen and twenty eight one-hundredth rods; thence around Clark's Point, following high water mark as near as practicable, allowing for necessary curves between the monuments placed by the superintendent of streets, and defined in the layout of said street, eighty feet wide, a distance of four miles, more or less, to a stone monument in the south line of contemplated Cove Street, on the west shore of Acushnet River; be, and the same is hereby accepted as a public highway."

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The only things left in uncertainty are the curves between the monuments erected by the superintendent of streets. The expression of the order is "allowing for necessary curves." But they certainly did not affect the land of the petitioners.

Thus the matter stood. The city went on with the construction of the road. Some alterations were made in the progress of the construction by agreement with the abutters. No change was made touching the land of the petitioners.

It is difficult to see why after June 13th 1853 the petitioners could not have pursued their legal remedy for damages.

The objection that notice was not given of the purpose to locate does not seem to be sustained by the facts. Nor having actually laid out and constructed their road over land of the petitioner could the city have been heard to make this objection. See Rev. Sts. *c.* 24, § 77.

Neither would the objection that the curve between the monuments was left uncertain have been an answer to the claim of the petitioners, whose land would have been taken on any construction of the location, and in point of fact was taken and wrought for travel.

Nor would the objection avail the city that the names of the owners of the land were not given in the laying out. If it would, there was no valid laying out in 1853 or 1855, and these petitioners have no claim for damages on any laying out, but must resort to their action of trespass.

So far the way is plain. On the first of December 1854 it was ordered in the board of aldermen that the superintendent of streets should make an additional return in conformity with the alterations made in progress of construction of said road as by agreement with proprietors of lands abutting thereon. The superintendent made a return following on the shoreside the line of the walk as constructed. On the 8th of January 1855, it was ordered that the city clerk notify the abutters that the mayor and aldermen would be upon the road on the 27th instant to lay it out. Whether any such meeting was had does not appear, or whether there was any action under the order.

On the 14th of May 1855 the following order was adopted:

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"Whereas the road around Clark's Point was laid out by the board of aldermen and accepted by the city council, June 13th 1853, as 'Clark's Point Road;' and whereas in constructing said road, it was deemed expedient to alter the line of the road in some places, thus rendering it necessary that a new layout should be made, which was accordingly done by the superintendent of streets, December 6th 1854, under the name of French Avenue, which layout was accepted by the board of aldermen, January 8th 1855; but as there is nothing upon the records which shows that there was any subsequent action taken in relation to accepting said road under the name of French Avenue given to it by the board of aldermen, December 6th 1854, therefore

"Resolved, that the road around Clark's Point be, and the same is hereby accepted as a public highway, in accordance with the new layout made by the superintendent of streets, Dec. 6th 1854.

"Resolved, that the name of said road shall be 'Clark's Point Road,' the name given to it when it was first accepted in 1853, by the city council."

The remaining question is, what effect is to be given to this order. The direction of the board of aldermen to the superintendent of streets was to make an additional return of said road. There was no petition for a new laying out, no actual laying out, nor any assessment of damages. Whether it can be regarded as an alteration of a way, it is not necessary for the interests of these petitioners to inquire.

The result of the whole matter then is, that as, under the first laying out, the petitioners might have recovered their damages, the statute of limitations, from such laying out, ran against them; that their claim for damages was barred by this statute, and that the petition for a mandamus must be dismissed.

T. D. Eliot & T. M. Stetson, for the petitioners.

W. W. Crapo, for the respondents.

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City of New Bedford *vs.* County Commissioners of Bristol.

The board of aldermen of a city laid out and accepted a public highway, awarded damages to landowners, and fixed a time for them to remove buildings. A landowner appealed from the award of the board of aldermen to the county commissioners, and obtained a new award of damages from a jury, whose verdict was accepted by the court of common pleas. The order for the removal of buildings had been previously revoked and due notice given, and the order accepting the street was afterwards also revoked, before any entry was made upon the land or possession thereof taken for the purpose of constructing the highway. *Held*, that under *Sts.* 1842, *c.* 86, and 1847, *c.* 259, the landowner was not entitled to a warrant of distress for the damages given by the jury, and that the order of the county commissioners issuing the warrant would be quashed on certiorari.

Petition for a writ of certiorari to quash the proceedings of the respondents, assessing damages to Elias Sampson, Jr., against the petitioners, for land taken for a street in New Bedford; and for an injunction to restrain the respondents from issuing a warrant of distress for such damages. The case was thus:

The street was laid out on the 28th of May 1856, and on the 16th of June accepted by the city as a public highway, and damages assessed to Sampson and other owners of lands over which it was laid. On the 25th of August the board of aldermen passed an order that the city clerk be directed to notify the owners of buildings on the street to remove them before the 1st of March 1857. Sampson appealed from the award of damages to the county commissioners, and at their regular meeting in September 1856 applied for a jury, and afterwards obtained a verdict for fifteen thousand dollars, which was returned to and accepted by the court of common pleas at December term 1856. On the 9th of December, before the return of the verdict, the board of aldermen revoked their order of August 25th for the removal of buildings, and directed the city clerk to notify its revocation to all persons upon whom it had been served; and on the 13th of January 1857 passed an order revoking their order of the 16th of June accepting this street as a public highway, and directed the city clerk to notify the abutters on the street

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thereof. Both of these orders were notified to Sampson. The orders are fully set forth in the opinion of the court. On the 24th of March 1857 the respondents issued a warrant of distress against the City of New Bedford for the amount of the verdict and costs. The land was never actually entered upon or taken possession of for the purpose of constructing the street. Upon the filing of the petition a temporary injunction was granted.

T. D. Eliot & W. W. Crapo, for the petitioners.

J. H. Clifford & O. Prescott, for the respondents.

Dewey, J. Upon the question whether the county commissioners have authority, in cases like the present, to issue a warrant of distress, we have not found it necessary to decide. If the question were whether in cases originating before them, upon petitions for locating highways, they might properly issue warrants when the town was by law required to pay damages, we should suppose that there could be no doubt. The *St.* of 1786, *c.* 67, § 6, gave to the court of sessions, who had at that time the jurisdiction now exercised by county commissioners, the authority to issue warrants of distress. In *Gedney* v. *Tewksbury*, 3 Mass. 307, it was held by this court, that this was the only remedy to enforce payment of land damages in case of public highways. By the *St.* of 1827, *c.* 77, § 4, county commissioners were vested with the same powers that had been exercised by the court of sessions, or by the commissioners of highways, a tribunal that succeeded by *St.* 1825, *c.* 171, to the powers of the court of sessions in the matter of establishing ways. The like power was further continued by the Rev. Sts. *c.* 14, § 16. The authority of county commissioners to issue warrants of distress seems to be distinctly recognized in the provisions of the *St.* of 1849, *c.* 124, requiring interest to be added in such cases to the award of the commissioners.

The only question that can exist upon this point is whether this power to issue warrants of distress is not confined to cases of highways originally cognizable by them, and excluding town ways brought before them as an appellate court; and whether the authority exercised by the city council of New Bedford under § 12 of *St.* 1847, *c.* 60, (the city charter) is any other au-

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thority than that which attaches to selectmen as to the laying out of town ways.

Without expressing any decided opinion upon the point whether a warrant of distress is the proper remedy to be resorted to with a view of enforcing the payment by the city of New Bedford of land damages awarded by a jury on an appeal from the city council to the county commissioners, and assuming that such authority may exist, the further inquiry is whether, upon the particular facts existing in the present case, such warrant of distress may properly be used to enforce payment of the damages awarded by the jury, or whether the party thus claiming damages should be restrained from enforcing such warrant. Independently of the *Sts.* of 1842, *c.* 86, and 1847, *c.* 259, the proceedings of the city council and the further action on the appeal to the county commissioners and the assessment of damages by the jury, as found by the case, would have vested the right to such damages in Sampson absolutely, and a subsequent discontinuance of the highway before the road was constructed would not defeat that right. Such was the rule of law as directly settled by this court in *Harrington* v. *County Commissioners*, 22 Pick. 266.

The apparent unreasonableness of payment of the whole value of the land, thus proposed to be converted into a public highway, but which was not in fact taken, and the want of a statute provision by which in such case the landowner could be indemnified for his actual injury, led to the passage of the *St.* of 1842, *c.* 86, by which it was provided that "the county commissioners shall not order the damages to be paid, nor shall any person claiming damages have a right to demand the same, until the land shall have been entered upon and possession taken for the purpose of constructing said highway or alteration." This statute being obviously applicable only to highways originally laid out by county commissioners, an additional act was passed applying the same provisions to town ways, and imposing the like restraints and duties upon selectmen. *St.* 1847, *c.* 259. The effect of these two statutes is to place on the same footing in this respect town ways and public highways, and thus render it

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immaterial to the question we are now considering, whether the location by the city council is to be treated as a location of a town way or a public highway.

Has the land of Sampson "been entered upon and possession taken for the purpose of constructing a way thereon"? If it has, then the landowner has a vested right to his damages, and the city of New Bedford is bound to pay the same. On the other hand, if the proceedings on the part of the city council have not gone to that extent, then he has no claim for the damages assessed by the jury, but must be content to receive what the law has allowed to him in such case, an adequate remuneration for any injuries and expense he may have sustained by such initiatory proceedings.

The location of the road by the city council, and the assessment of damages by a jury and acceptance of their verdict, were not sufficient to give a vested right to Sampson to recover such damages. The road was not in fact constructed, nor the land in fact entered upon for the purpose of opening the street. Independently of a single act, that of the order of the board of aldermen of August 25th 1856, directing the city clerk "to notify the owners of the buildings on that portion of Ray Street between Union and Williams Street to have all the buildings, except those fronting upon Union Street, removed before the 1st of March 1857, and that the buildings fronting on Union Street be removed from the street on or before the 1st of May 1857," there is nothing to sustain the right to these damages. We do not understand that this order had been acted upon by Sampson, or any buildings removed by him in pursuance of it. This order was a very significant act on the part of the city authorities of their purpose to open this road, but not more so perhaps than the earlier act laying out the same with all the formalities of law. But this order was revoked by the board of aldermen on the 9th of December 1856, and "the city clerk directed to notify all persons upon whom that order was served, that the same has been revoked, and that no action on their part is required without further notice."

On the 13th of January 1857, the city council passed a fur-

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ther order revoking the order of the 16th of June 1857 laying out this street, and the city clerk was directed to notify the abutters on said street of the same. It is objected to this vote of January 13th 1857, that it cannot be considered as a legal discontinuance of a road already established. This may be so; but it is to be borne in mind that the right of the landowner to recover his damages does not depend upon the question of an existing actual location and establishment of a way over his land, but whether "the land has been entered upon and possession taken."

The vote of the city council, taken in connection with the order of the board of aldermen of December 9th 1856, furnished competent and proper evidence at least that the city authorities did not intend to enter upon the land and construct the road. These proceedings would seem amply sufficient notice of that purpose, and would also lay the foundation of a claim for damages for any expenses and trouble occasioned by these proceedings, which were now proposed to be abandoned.

Upon the case stated, the court are of opinion that the petition presents a proper case for granting a writ of certiorari as prayed for, and that the injunction heretofore granted, restraining the party and all officers from attempting to enforce or collect said warrant, be continued until the further order of this court.

Timothy P. Ide *vs.* Edward D. Pearce & another.

Land conveyed was described in the deed, after an accurate description of its boundaries from its northern extremity around its western and southern sides to a point on the east at the K. road; "thence turning and running northerly, bounding easterly by said road until it comes to land of B.; thence turning and running westerly by land of said B. until it comes to the southeasterly corner of an acre lot" included in the land conveyed; "thence turning and running northerly, bounding easterly by said B.'s land to the W. road; thence turning and running westerly, bounding northerly by said road, to the place of beginning." The K. road extended northeastwardly until it joined the W. road, which ran from northeast to southwest. On the southwesterly side of the W. road, between that junction and the point of beginning of the description, were three lots, equal

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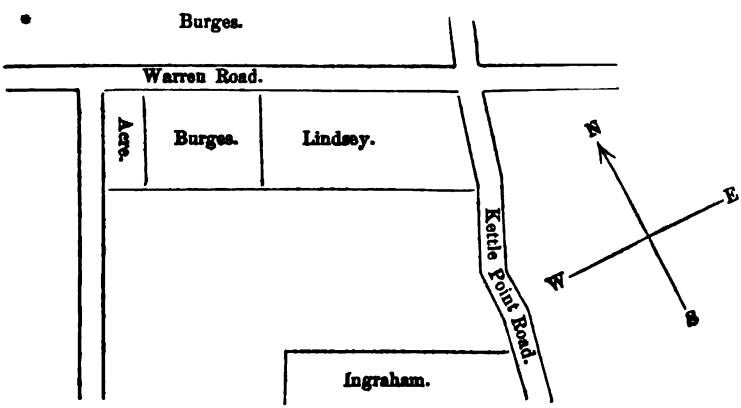
in depth; the widest, known as the L. lot, next the K. road; then a lot of B., and then the acre lot. B. owned all the land abutting on the opposite side of this part of the W. road. The deed referred to the grantor's sources of title, and a plan, none of which included the L. lot. *Held*, that the L. lot did not pass by the deed.

ACTION OF TORT for breaking and entering the plaintiff's close in Seekonk, known as the Lindsey Lot, and carrying away hay. Answer, title in the defendants. Trial before *Dewey*, J., who reserved the question of title for the decision of the whole court upon the following case:

Prior to the 5th of July 1853, the plaintiff was seised in fee of a tract of land in Seekonk, southeastwardly from the dwelling-house of the late Hon. Tristam Burges, and bounded on the north by a road from India Bridge to Warren; on the west by a highway and driftway extending to Providence River; on the south by Providence River and Bowers's Cove; and on the east by land of David Humphrey, land of John T. Ingraham, and the Kettle Point Road, excepting therefrom the lot marked "Burges," but including the lot marked "Lindsey" on the plan in the margin, which shows so much of the tract as is necessary to the understanding of this case.* Said Burges owned the "Burges" lot, and also the land on the opposite side of the Warren Road.

On the 3d of July 1853 the plaintiff conveyed to John Wilson Smith (whose title the defendants now had,) by the following



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description: "Beginning at the northwest corner of a lot of land containing about an acre, at the junction of the road leading easterly from India Bridge to Warren with the road or highway running southerly, opposite the farm house of Tristam Burges, and from that point running southerly to Providence River, bounding westerly on said highway, and a driftway two rods wide, laid out between the land of the grantor and land of Tristam Burges, as is delineated and described on a plat of the Lyon Farm, surveyed by Daniel Anthony, January 20th 1802; from thence bounding southerly by the Providence River, with and along the shore of said river, around the point of land at the mouth of Bowers's Cove, and thence with and along the shore of said Bowers's Cove until it comes to land of David Humphrey; thence turning and running northerly, bounding easterly by land of said Humphrey and John T. Ingraham, to the northwest corner of said Ingraham's land, which he recently bought of the grantor; thence turning and running easterly, bounding southerly by said Ingraham's land, to the road leading to Kettle Point; thence turning and running northerly, bounding easterly by said road, until it comes to land of Tristam Burges; thence turning and running westerly, bounding northerly by land of said Burges, until it comes to the southeasterly corner of the acre lot first mentioned; thence turning and running northerly, bounding easterly by said Burges's land, to the Warren road; thence turning and running westerly, bounding northerly by said road, to the place of beginning. Containing, by estimation, about one hundred and eighty acres of land, with a dwelling-house, six barns and other improvements thereon." "The estate hereby conveyed being the several parcels or lots of land purchased and held" by the grantor under certain deeds particularly described, and under his father's will. "To which deeds, will and plat aforesaid reference may be had," and in none of which was the Lindsey lot particularly described. That lot was meadow, and separated from the other lands by a fence.

The question between the parties was, whether the Lindsey lot passed by the deed from the plaintiff to Smith. The only boundaries in dispute were from the end of the course "to the

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road leading to Kettle Point" to "the southeasterly corner of the acre lot."

J. H. Clifford & E. H. Bennett, for the plaintiff, cited *Sawyer* v. *Kendall*, 10 Cush. 241; *Ricker* v. *Barry*, 34 Maine, 116; *Haynes* v. *Young*, 36 Maine, 557; *Peaslee* v. *Gee*, 19 N. H. 273; *Benedict* v. *Gaylord*, 11 Conn. 336; *Thatcher* v. *Howland*, 2 Met. 41; *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Ipswich, petitioners*, 13 Pick. 431; *Knight* v. *Wilder*, 2 Cush. 210; *Lunt* v. *Holland*, 14 Mass. 149.

E. Ames & B. Sanford, for the defendants. After coming "to the road leading to Kettle Point," the boundary line proceeds, "thence turning and," 1st, "running northerly," 2d, "bounded easterly by said road," 3d, "until it comes to land of Tristam Burges." This is fully satisfied by running to the place where the two roads meet; for Burges owned the land on the opposite side of the Warren Road, and consequently the fee to the centre of the road, subject to the public easement. "Thence," 1st, "turning and," 2d, "running westerly," 3d, "bounding northerly by land of said Burges, until it comes to the southeasterly corner of the acre lot." All these calls also are satisfied by turning at right angles, and running in a general westerly direction, at first northwesterly by the land of Burges over which the Warren Road is laid, then southwesterly by the Burges lot, then northwesterly again by said lot to the corner of the acre lot.

Or the boundary in dispute, with fewer inconsistencies than by the plaintiff's construction, may be interpreted as "running northerly" — first northeasterly, then northwesterly, but, taken together, exactly northerly — "bounded easterly by said roads," to wit, the Kettle Point and Warren Roads, [*Clifford.* The next preceding other road is the one "running southerly to Providence River,"] "until it comes to land of Tristam Burges," namely, the Burges lot on the plan; "thence turning and running westerly" — northwesterly and southwesterly, but in general exactly westerly, — "bounding northerly by land of said Burges," to the corner of the acre lot.

The plaintiff's construction is inadmissible, because it excludes the Lindsey lot, so called, owned by the grantor, contrary

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to the general description, which purports to convey an entire tract, without any reservation, and bounding on the north only on land of Burges; and because by it the eastern boundary does not continue "by said road until it comes to land of Tristam Burges," nor, on reaching land of Burges, "thence turn and run westerly;" but turns at a right angle on reaching the Lindsey lot, without any call in the deed; and then runs westerly, instead of northerly, to land of Burges; and on reaching it, instead of turning as required by the deed, keeps on in the same course.

The reference to former conveyances cannot control, for the benefit of the grantor, a description which answers all the abuttals or calls. *Talbot* v. *Copeland*, 32 Maine, 252. *Lincoln* v. *Wilder*, 29 Maine, 181, 183. *Sawyer* v. *Kendall*, 10 Cush. 241. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15.

Thomas, J. Whether upon the true construction of the deed of the plaintiff to Smith (the defendant's grantor) it includes the Lindsey lot is the only question in the case. The land conveyed is first described by metes and bounds, and then by reference to the deeds and will by which the grantor obtained his title. If the first description is plain and unequivocal it should govern, though it is difficult to say that there is more than one rule of construction that has not its exceptions; and that is, taking the whole instrument together, what does it mean?

The description by metes and bounds in this deed is an impossible description. Its lines cannot be run. The parties agree upon the boundaries as marked upon the plan, extending from the point of beginning to the Kettle Point Road. Beyond this no way is open to the point of departure. The way indicated by the deed is "northerly, bounded easterly by said road, until it comes to land of Tristam Burges." There is no land of Burges in that direction until you have crossed the road leading from India Bridge to Warren, and when you have got there, there is no way of return. The deed invites us to turn and run westerly, bounded northerly by land of said Burges, to the southeast corner of the acre lot. You cannot follow the line and reach the point proposed. The ingenuity of counsel has

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not been able to thread the way. It is blocked by two right angles, and a part of the distance can have no land of Burges as the northern boundary.

It is a plain case of false demonstration. The scrivener evidently supposed that the land of Burges extended to the Kettle Point Road and included the Lindsey lot. He clearly had no idea that he was including it within the bounds of the grant.

Running the line to the southeasterly corner of the Lindsey lot, and then turning and running westerly, the lines meet and are welded outside of the land in controversy.

We turn to the other parts of the deed for relief, and find that in the plat of the Lyon farm, and the deeds and will under which the grantor held, the Lindsey lot was not included.

Looking at the whole instrument, and seeking for the intent of the parties by the best lights we have, we are satisfied the Lindsey lot did not pass by the deed of Ide to Smith. *Parks* v *Loomis*, 6 Gray, 467. *Kendall* v. *Brown*, 7 Gray, 210.

Judgment for the plaintiff.

ANNIS A. LINCOLN *vs.* ANSELM BASSETT.

Proceedings in insolvency will not be set aside, as originally defective, on a bill filed by the debtor more than six years after their commencement, and after he has without objection appeared at several meetings of his creditors and submitted himself to examination.

An insolvent debtor cannot maintain a bill in equity against his assignee for misconduct, without first applying to the court of insolvency for relief.

BILL IN EQUITY, filed by an insolvent debtor on the 7th of April 1857, to compel his assignee to render an account, and to set aside the proceedings in insolvency, which were commenced against him by the petition of one of his creditors, on which, after a hearing, a warrant was issued, returnable in June 1850, when the first meeting was held, schedules of debts and assets presented by the debtor, the defendant chosen assignee, and an assignment made to him; the second meeting was held in Sep-

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tember 1850, at which the debtor submitted to an examination according to law; and the third meeting in November 1850, and kept open by repeated adjournments until June 1856, when the debtor applied for his discharge, which was refused by the judge on the ground that the meeting was irregular and not a legal adjournment of the third meeting.

The bill, after stating these facts, alleged that the defendant has received in cash from the estate a sum exceeding five thousand dollars, but had never rendered any account; and that no dividend had ever been ordered, notwithstanding the requirement of the statute that within eighteen months from the time of the assignee's appointment his account should be produced and settled and a dividend made; and that the judge and assignee had, "by their own neglect to act as by law required, forfeited all jurisdiction, authority and claim to any of said estate," and that it should in equity and justice be returned to the debtor.

The bill further alleged that there was no cause for issuing the warrant, because the petitioning creditor had no legal claim, and because the officer's return mentioned in the petition did not distinctly show an attachment of the debtor's estate; that the defendant had been unfaithful to his trust by allowing debtors to the estate to prove claims against it, and by neglecting to collect debts due to it; and that this petitioner believed he had obtained an assent to his discharge from a majority in number and value of his creditors, but owing to lapse of time was unable to prove it.

The defendant demurred generally to the bill.

C. I. Reed, for the defendant.

J. Brown, for the plaintiff.

BIGELOW, J.* So far as this bill seeks to set aside and vacate the proceedings in insolvency, it cannot be sustained. The plaintiff, having suffered the proceedings to go on after notice and without objection for upwards of six years, and having ap-

* The remaining cases of this term were argued at Boston in January 1858 before all the judges except THOMAS, J.

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peared and taken part at the various meetings of the creditors, thereby submitting and assenting to the jurisdiction of the court of insolvency, cannot now be heard to say that the proceedings were originally defective and void.

So far as the bill goes on the ground of a neglect by the assignee to render his accounts in due season, and to make a dividend according to law among the creditors of the insolvent, it is open to the objection that the proper remedy in such case is to apply in the first instance to the court having original jurisdiction of the insolvent proceedings. *Demurrer sustained.*

William Carnoe *vs.* Inhabitants of Freetown.

An inhabitant of P., being out of health, gave up business there and removed to F. with the intention of remaining there through the summer, and returning to P. in the autumn to reside and do business there. The next autumn his health was restored, but, not finding satisfactory business in P., he remained in F. until the following March, when he entered into business elsewhere, and intended as soon as he could make arrangements, to remove to C. to reside, and made a contract for the removal of his furniture to C. as soon as possible, and on the first of May put it on board a vessel, and a few days after personally removed to C. *Held*, that he was rightly taxed in F. on said first of May.

Action of contract to recover back a tax assessed by the defendants upon the plaintiff's poll and personal estate for the year 1855. Trial in the court of common pleas before *Mellen*, C. J., who allowed the following bill of exceptions:

The only question upon which the parties were at issue was, whether the plaintiff was an inhabitant of Freetown on the first day of May 1855; and for the purposes of the trial it was admitted that if at any time subsequent to 1853 the plaintiff had acquired a domicil in Freetown, he had his domicil there on said first day of May.

The plaintiff offered evidence tending to prove the following facts: He was a native of the defendant town, where he resided with his parents until the fall of 1843, when he removed to

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Providence, and there continued to reside until the 6th or 7th of April 1854. In the fall of 1844 the plaintiff's father and mother removed from Freetown to Providence, where they both continued to reside until the death of his father, and his mother afterwards, until August 1854, when she gave up her house, and removed with all her furniture to Freetown to attend on a sick sister. Some time prior to 1854 the plaintiff had married the daughter of a resident of Freetown; but boarded in the family of his father both before and after his marriage and until April 1854, when, on account of the condition of his health, which had been gradually failing for two years, he gave up his business in Providence, and with his wife removed to Freetown, carrying with him his furniture, consisting of a few articles which, for his better accommodation, he had used while boarding with his mother.

The plaintiff himself testified that when he removed to Freetown, he did it with the intent of remaining there through the warm weather, and of returning to Providence as early as the September following, to do such business in Providence as he could find to do, and reside there. He remained with his wife in Freetown until September 1854, when, his health being sufficiently restored, he attempted to get into business in Providence, and for that purpose went there several times during the subsequent fall and winter, but did not succeed in finding business agreeable to him before the 27th of March 1855, up to which time, except when temporarily absent, he continued to reside with his wife in Freetown. On the 27th of March 1855 the plaintiff went to Providence and bought the interest in a cotton manufactory in Uxbridge in this state, and on the 2d of April 1855 entered into a partnership, under which he had since carried on the factory. About the middle of April 1855 he hired a house in Cumberland, R. I., and made a contract for the carriage from Freetown to Providence, as soon as possible, of his furniture and his mother's, which were put on board a vessel and carried out of the river on the first day of May, the earliest day upon which the goods could be conveniently put on board the vessel on account of the state of the tides; and a few days

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afterwards, the plaintiff's wife went to Cumberland, and the plaintiff and his family had since occupied said house. From the 27th of March 1855 to the 1st of May 1855 the plaintiff was a part of the time in Providence, a part of the time in Uxbridge, and a part of the time in Freetown, and on said first day of May was in Freetown. The plaintiff also testified that at the time of entering into his present business, on the 27th of March 1855, he intended, as soon as he could make arrangements, to remove his family to Cumberland, and reside there. It was also shown by the plaintiff, that for the year 1854 he was taxed in Providence, but did not pay that tax until June 1855, after the defendants had assessed him for the year 1855 in Freetown; and that in August 1855 he was assessed as a resident of Cumberland.

The defendants requested the court to instruct the jury as follows:

"1st. That if they should believe that, when the plaintiff left Providence in April 1854, he left with an intent to return to Providence upon the restoration of his health, or in the event of his being able to form a business connection satisfactory to himself, or other uncertain contingency; and that during this time he had no house, tenement or place of business in Providence; this would not be such an intent to return as would prevent his acquiring a domicil in Freetown.

"2d. That if upon the evidence the jury shall be satisfied that on the 2d of April 1855, in forming his connection in business in which he is now engaged, and from that time, the plaintiff intended to take up his residence in Cumberland, R. I., this abandonment of his intention to return with his family from Freetown and resume his residence in Providence would fix his domicil in Freetown until such time as he did acquire a domicil in Cumberland."

These instructions the court declined to give; but offered to instruct the jury that if they should believe the testimony of the plaintiff, he would be entitled to a verdict. Whereupon a verdict was taken for the plaintiff, and the defendants alleged exceptions.

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B. Sanford, for the defendants.

C. I. Reed, for the plaintiff. The first instruction prayed for was properly refused, because there was no evidence to which it was applicable. *Drake* v. *Curtis*, 1 Cush. 395. The fact that the plaintiff did not return to Providence as soon as he first intended does not affect the case. *Sears* v. *Boston*, 1 Met. 250. *Fitchburg* v. *Winchendon*, 4 Cush. 190.

The second instruction prayed for was also rightly refused. The plaintiff did not lose his residence in Providence until he gained one somewhere else; and supposing he still had one in Providence, (which is the hypothesis on which the second request is based,) the mere determination to go to Cumberland would not give him a domicil in Freetown, but he would retain his domicil in Providence until he actually acquired one in Cumberland. *Bulkley* v. *Williamstown*, 3 Gray, 493.

The instruction which the court proposed to give was correct. The plaintiff never lost his domicil until his actual removal to Cumberland.

Shaw, C. J. On the 1st of May 1855, when this tax was assessed, the plaintiff had ceased to be domiciled in Providence, because he had in fact quitted it, and, as early certainly as March, abandoned his intention to return to it. He had not acquired a domicil in Uxbridge or Cumberland, because he had not removed there, nor exercised any right of citizenship there; he had only an intention of removing. He was actually in person in Freetown on the 1st of May, and had no domicil for taxation elsewhere. He was therefore taxable in Freetown. See *Holmes* v. *Greene*, 7 Gray, 299; *Bulkley* v. *Williamstown*, 3 Gray, 493; *Kilburn* v. *Bennett*, 3 Met. 199.

Exceptions sustained.

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Oliver S. Wilbur *vs.* Samuel Taber.

Under Rev. Sts. c. 85, §§ 11, 12, an entry in a record of a justice of the peace that the "defendant appears and pleads orally and says he is not guilty" is a joinder of issue; and the defendant can give in evidence any matter admissible under any general or special plea in bar; and if the case is carried by appeal to the court of common pleas, and no further pleading is ordered, the same evidence is admissible there, as would have been in the court below.

Action of tort, commenced before a justice of the peace. The declaration alleged that "the defendant by his cattle forcibly entered the plaintiff's close in Raynham," (described,) and "by said cattle trod down and depastured the grass there standing and growing." The record of the justice, after stating the cause of action and the defendant's appearance, proceeded as follows: "And now the defendant comes and defends and pleads (orally) and says that he is not guilty. Issue being joined, after a full hearing, it appears to the said justice that the said defendant is guilty." The record then stated a judgment for the plaintiff, and an appeal to the court of common pleas, where the case was tried before *Mellen*, C. J., who allowed this bill of exceptions:

"No answer was filed in the court of common pleas. The plaintiff did not request the court to order the defendant to file an answer, nor did the defendant ask leave to file one, but elected to go to trial upon the pleadings which appeared by the justice's record.

"On the reading of the writ, the plaintiff asked the court that the defendant might be called, because no answer had been filed. But the court overruled the motion, on the ground that it appeared that an issue had been joined before the justice of the peace.

"During the trial, the defendant offered evidence tending to show that when the defendant's cattle went upon the plaintiff's land they did so on account of the plaintiff's negligence in maintaining his part of the division fence between the plaintiff and defendant, which the plaintiff was bound by prescription to

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maintain. To this evidence the plaintiff objected, on the ground that it was inadmissible under the pleadings in the case. The objection was overruled, and the evidence admitted. The verdict was for the defendant. To which rulings the plaintiff excepts."

C. I. Reed, for the plaintiff. 1. A joinder of issue by an oral plea before a justice of the peace can only be shown by his record "that the defendant appears, and orally denies the plaintiff's right to maintain his action, and puts himself on trial; or words to that effect." Rev. Sts. *c.* 85, §§ 11, 12. The record does not show "words to that effect," but the technical general issue in trespass, "not guilty." It was not the plea permitted by the statute, and should not have been allowed by the justice, or treated as affording any obstacle to a default in the court of common pleas. Rule 19 of C. C. P. in 1855.

2. If this was a sufficient joinder of issue, the case should have been tried in that court according to its own rules, and nothing should have been admitted in evidence which would not be admissible under the general issue. *Hunt* v. *Wilson*, 1 Met. 309. The evidence offered was not admissible under the general issue. 2 Greenl. Ev. § 625. 1 Chit. Pl. (6th Amer. ed.) 492, 493. *Knapp* v. *Salsbury*, 2 Campb. 500. *Milman* v. *Dolwell*, 2 Campb. 378.

J. Brown, for the defendant.

MERRICK, J. The exceptions of the plaintiff must be overruled. The entry upon the record of the magistrate that the "defendant appears and pleads orally and says he is not guilty," is equivalent to a denial of the plaintiff's right to maintain his action, and is exactly to the same effect as if those words had been used. This, by express permission of the statute, is a joinder of the issue, upon which a trial may be had. The defendant was therefore entitled to proceed to trial; and, by a further provision of the statute, to give in evidence any matter which would have been admissible if the defence had been made under any general or special plea in bar. Rev. Sts. *c.* 85, §§ 11, 12. No new pleading was ordered, and therefore none was required in the common pleas, when this case was carried

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there by appeal. And the rights of the parties, in relation to the production of evidence upon the trial in that court, were the same as those to which they were entitled when they were before the magistrate to whom the writ was made returnable. Rule 19 of C. C. P. See also St. 1836, c. 273.

Exceptions overruled.

ABIGAIL WINSLOW *vs.* DANIEL DRISKELL.

Evidence that neither of the parties to a deed understood its legal effect and operation at the time of its delivery is inadmissible to defeat the deed.

WRIT OF ENTRY to recover a life estate in the premises described in the writ. Trial before *Thomas*, J., who signed the following bill of exceptions:

"The demandant produced a lease of the premises made to her by the tenant for and during the term of her natural life; and proved its execution. The tenant then admitted that there was the usual delivery of the instrument; but contended that there was no legal delivery in this case, for the reason that neither of the parties understood the legal effect of the instrument, or its operation; and offered to prove such to be the fact. But the court ruled such testimony to be incompetent, and instructed the jury to find a verdict for the demandant. And the tenant excepts."

J. C. Stone, for the tenant.

R. C. Pitman, for the demandant, was stopped by the court.

BY THE COURT. Nothing is better settled than the rule which precludes a party from proving that he misunderstood the legal effect of a written contract, which has been duly executed and delivered by him, where there is no allegation of fraud by which he was misled or deceived. *Exceptions overruled.*

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EDWIN B. GIFFORD *vs.* WILLIAM BARKER & another.

The right of an insolvent debtor to a certificate of discharge upon the assent of the requisite proportion of his creditors whose debts are proved at the expiration of the six months cannot be affected by the subsequent expunging of the proof of any debt as having been allowed by mistake.

APPEAL from a decree of the judge of insolvency in Bristol, refusing a certificate of discharge to an insolvent debtor. The case was submitted to this court upon the following facts:

On the last day of the six months from the assignment, the appellant procured and filed with the register of insolvency the consent in writing to his discharge of a majority in number and value of the creditors who had proved their claims. At a subsequent adjournment of the third meeting, the judge, in the presence of the debtor, creditors and assignees, passed an order striking out a portion of one of those claims, as having been entered by mistake and on the supposition that the creditor, who was a surety of the debtor, had paid a certain sum which he had not. This striking out reduced the amount of the claims of creditors who had assented to the discharge to less than one half; and the judge therefore refused the certificate.

O. Prescott, for the appellant, cited *St.* 1848, *c.* 304, § 9; *Merriam* v. *Richards*, 3 Gray, 252; *Gates* v. *Campbell*, 8 Cush. 104; *Leigh* v. *Arnold*, 5 Cush. 615.

No appearance for the assignees.

BIGELOW, J. The insolvent's rights were fixed by the state of the record at the expiration of the six months. If he then had the assent of the requisite proportion of the creditors whose claims appeared to be proved upon the record, he was entitled to his discharge; he has no means, except the record, of knowing what claims are legally proved; nor could his rights be affected by a subsequent amendment of the record. Any other rule would work great injustice to him; for he may, by relying on the record, have been prevented from obtaining the assent of other creditors within the six months.

Decree reversed.

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ANNA HAYDEN *vs.* WILLARD SNELL.

A promise to pay "J. S. or his wife A. S." an annuity "during their natural lives," is a promise to pay during their joint lives and the life of the survivor.

ACTION OF CONTRACT on this note: "Bridgewater, October 20, 1842. For value received I promise to pay Charles Hayden or his wife Anna Hayden the sum of eight dollars yearly during their natural lives. Willard Snell."

The plaintiff in her declaration set forth the making of the note, the death of her husband, and the subsequent refusal of the defendant to pay the annuity to her. The defendant demurred, upon the ground that the declaration showed no cause of action, because upon the face of the note nothing was to be paid after the death of either payee. In the court of common pleas, *Briggs*, J. overruled the demurrer, and the defendant alleged exceptions.

E. Ames, for the defendant. The words "during their natural lives" should be construed according to grammatical rules. *Love* v. *Pares*, 13 East, 84. *Perry* v. *Skinner*, 2 M. & W. 471. "During their natural lives" or "during their lives" is the same as "during their joint lives," and not the same as "during their lives and the life of the survivor of them." The words do not admit of so much doubt as to call in aid the rule of construing the words most strongly against the grantor. *Adams* v. *Warner*, 23 Verm. 411.

J. Brown, for the plaintiff.

BIGELOW, J. The contract declared on was in legal effect an agreement to pay the stipulated sum yearly to both of the persons named as promisees, and, so long as both survived, an action might have been maintained in their names jointly. *Osgood* v. *Pearsons*, 4 Gray, 455. *Willoughby* v. *Willoughby*, 5 N. H. 244. Upon the death of either, the right of action would remain in the survivor. 1 Chit. Pl. (6th Amer. ed.) 21. It was therefore, legally interpreted, a promise to pay both and the survivor of them so long as they or either of them should live.

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The purpose of adding to the contract the words "during their natural lives" was not to change the legal effect of the promise to the two, so as to limit the liability to their joint lives, but to mark the period when the annuity should cease. Not being intended as an absolute promise to pay a certain fixed sum at all events, it was necessary to add a clause which should indicate the time when the yearly payment was to terminate.

Demurrer overruled.

BRIDGET REARDON *vs.* BARTHOLOMEW RUSSELL.

A bastardy process is not to be dismissed by the court of common pleas because the attorney appearing there for the complainant is the justice before whom the sworn accusation was made.

BASTARDY PROCESS. The justice before whom the complaint was instituted and the complainant's examination taken, and who issued the warrant for the respondent's arrest and took his recognizance for his appearance at the court of common pleas, entered the papers in that court and appeared there as the complainant's only attorney. On this ground that court on motion of the respondent dismissed the complaint, and the complainant appealed.

L. Lapham, for the complainant.

J. Brown, for the respondent.

DEWEY, J. The provisions of the Rev. Sts. *c.* 85, § 34, that "no justice shall be retained or employed as counsel or attorney before any court, upon appeal or otherwise, in any suit or action which shall have been previously determined before himself," are such as to prohibit in all cases the appearance of a person as counsel who has previously officiated as a justice in the same case. It is not necessary therefore, with reference to such appearance as counsel, to consider particularly the question whether this is a civil action. The St. of 1851, *c.* 96, seems, however, to have distinctly marked its character, by declaring that its pro-

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ceedings shall be "according to the course of proceedings in civil cases." The Rev. Sts. *c.* 85, § 34, do clearly preclude the justice from appearing as attorney or counsel upon the trial of the case upon the appeal taken to the court of common pleas, and to this extent the ruling was proper. But there was no occasion for the further order dismissing the complaint, if the complainant elects to appear by herself or by other counsel. The provision of the same statute, that a justice shall not "try any civil action commenced by himself or by his order or direction, and every civil action so commenced shall be dismissed," is not applicable to the present case. There is nothing to show that this suit was commenced by the order or direction of the justice, or that he was in any way employed as attorney or counsel until after the respondent was apprehended and ordered by the justice to give bonds to answer to said complaint at the next term of the court of common pleas.

The order dismissing the appeal was erroneous, and the case must be remitted to the court of common pleas for further proceedings.

HENRY S. HUTCHINS & another *vs.* PATRICK BYRNES & wife.

It seems, that in this commonwealth sealing, without signing, is not a sufficient execution of a conveyance of land.

A committee empowered by vote of a corporation to authorize the treasurer to convey real estate may communicate such authority orally.

An assignment of a mortgage of real estate from a corporation, concluding, "In witness whereof the said B. C. S. Bank, by J. S., their treasurer, duly authorized for this purpose, have hereunto set their name and seal," signed "J. S., Treasurer B. C. S. Bank," and sealed, is in form executed by the corporation.

WRIT OF ENTRY to foreclose a mortgage of real estate. At the trial in the court of common pleas before *Briggs*, J., the plaintiffs claimed to hold the mortgage by an assignment which purported in the body thereof to be from the Bristol County Savings Bank, and concluded thus:

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"In witness whereof the said Bristol County Savings Bank, by George Atwood, their treasurer, duly authorized for this purpose, have hereunto set their name and seal this twenty ninth day of November 1856.

"Geo. B. Atwood, Tr.
"Bristol County Savings Bank. } [Seal.]

"Then George B. Atwood acknowledged the foregoing instrument to be the free act and deed of the said Bristol County Savings Bank and of himself.

"George M. Woodward, Justice of the Peace."

To prove the authority of the treasurer to execute this assignment, the plaintiffs relied upon the by-laws of the corporation, which provided that it should be managed by a board of trustees, who should "have control in all matters of the institution not specially provided for," and "have power to elect a treasurer and such other officers as the interests of the institution might require;" and upon votes of the trustees and of the corporation, "that the treasurer be authorized to sign all deeds and instruments for the legal conveyance of real estate, under the direction of the committee of investment."

The treasurer testified that the committee of investment held meetings every Monday, but kept no records of their doings. He also testified, against the defendants' objection, that he was authorized by that committee to execute this assignment.

Upon this evidence the defendants objected to the admission of the assignment of the mortgage,

"1st. Because it did not appear that the treasurer had the requisite legal authority from the corporation to execute said assignment.

"2d. Because said assignment was not so executed as to be the act and deed of the corporation."

But the judge overruled the objections, and permitted the deed to be offered in evidence. A verdict was taken for the plaintiffs, and the defendants alleged exceptions.

B. Sanford, for the defendants. The assignment of the mortgage was not proved. The direction of the committee of investment to the treasurer should be in writing, and by re-

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corded vote of the committee. And the assignment was not executed in the corporate name, nor with the corporate seal. *Elwell* v. *Shaw*, 16 Mass. 42, and notes thereto in 1 Amer. Lead. Cas. (3d ed.) 575, & cases there cited. *Brinley* v. *Mann*, 2 Cush. 337.

E. H. Bennett, for the plaintiffs. The trustees had by the by-laws "control in all matters not specially provided for," and the treasurer testified that he had the authority of the committee of investment to assign this mortgage.

The assignment was duly executed. The corporation are the grantors named therein; they declare that they have set "their corporate name and seal" thereto; and it is acknowledged to be "their free act and deed." As their corporate name is actually signed, the preceding words, "Geo. B. Atwood, Tr." may be rejected as immaterial. See *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417.

Even if no name were attached, the corporate seal would be quite sufficient. 2 Bl. Com. 306. *Cromwell* v. *Grunsden*, 2 Salk. 462. It is so held in England, even under the statute of frauds. *Cooch* v. *Goodman*, 2 Ad. & El. N. R. 580. *Aveline* v. *Whisson*, 4 Man. & Gr. 801. *Cherry* v. *Heming*, 4 Exch. 631. Shep. Touchst. (Prest. ed.) 56, note. And in the Rev. Sts. c. 59, § 1, "deed executed" means as at common law. [Bigelow, J. Sections 16 & 18, providing for "proving the handwriting of the grantor and of any subscribing witnesses" of unacknowledged deeds, imply that he must sign.] In those cases, perhaps. But they equally imply that there must be witnesses, which this court has decided to be unnecessary. *Dole* v. *Thurlow*, 12 Met. 166. [Bigelow, J. By § 29, "all estates or interests in lands, created or conveyed without any instrument in writing, signed by the grantor or his attorney, shall have the force and effect of estates at will only."] If an estate at will, it is sufficient for this case. And our statute is not more positive than the English. [Bigelow, J. "And no estate or interest in lands shall be assigned, granted or surrendered, unless by a writing *signed* as aforesaid, or by operation of law." Rev. Sts. c. 59, § 29.]

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METCALF, J. The defendants' counsel contends that the direction of the committee of investment to the treasurer should have been in writing and by their recorded vote. But the committee kept no records, and were not bound to keep any; nor was it necessary that their direction should be in writing. Angell & Ames on Corp. § 291 *a*.

The defendants' main reliance is on the objection that the assignment in question was not so executed by the treasurer as to be the act and deed of the corporation. But we are of opinion that this objection cannot be sustained. The assignment was made in the name, and as the act, of the corporation, according to the rule laid down in *Combes's case*, 9 Co. 76 *b*, and always adhered to in England and in this commonwealth. In *Brinley* v. *Mann*, 2 Cush. 337, and in *Elwell* v. *Shaw*, 16 Mass. 42, cited for the defendants, that rule had not been complied with. The distinction between this case and those is most manifest. Nor is there in the collection of decisions on this point, in 1 Amer. Lead. Cas. to which we were referred, a single case that renders the validity of this assignment doubtful.

Conditional judgment to be entered.

JAMES S. QUINLEY, Executor, *vs.* TIMOTHY G. ATKINS.

A deposition taken in another state by a magistrate, whose certificate states that the deponent swore to the truth of the deposition, is admissible in evidence, though the certificate does not state that the deponent was sworn previously to his examination.

Proof that written notice was given of the filing of interrogatories may be made without giving notice to produce said written notice.

ACTION OF CONTRACT for work and labor. At the trial in the court of common pleas, the plaintiff offered in evidence a deposition taken in New Hampshire under a commission, to the admissibility of which the defendant made two objections.

1st. The only statement in the caption of the swearing of the witness was, that on the day appointed for taking the deposition

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he appeared before the magistrate, "and made solemn oath that the within deposition, by him subscribed, contains the truth, the whole truth, and nothing but the truth, relative to the cause for which it was taken." The defendant objected to the sufficiency of the caption, on the ground that it did not appear that the deponent was sworn before he answered.

2d. The plaintiff, in order to show that he duly gave notice to the defendant of the filing of the interrogatories before taking out the commission, introduced a witness who testified that he sent a written notice to the then attorney for the defendant, since deceased. At this point, the defendant objected to the witness stating the contents of the notice. The witness then further stated that he had no copy of the notice. The defendant still objected to the witness stating the contents of the notice, on the ground that it was incompetent; and that, if competent in any event, it was not competent till after notice to produce said written notice had been first given to the defendant.

But *Briggs*, J. admitted the witness to testify as to the contents of said notice; and ruled that the caption was sufficient, and that the deposition was admissible. To these rulings, after verdict for the plaintiff, the defendant excepted.

C. I. Reed, for the defendant.

E. H. Bennett, for the plaintiff.

METCALF, J. There is no legal ground for these exceptions. The objection to the admissibility of the deposition must be overruled, on the authority of *Amherst Bank* v. *Root*, 2 Met. 522, which case cannot be distinguished from this. And the objection to the proof of the notice that was given of the filing of interrogatories must also be overruled. When an instrument to be proved is itself a notice, it may be proved without giving notice to produce it. So said Mr. Justice Bayley, in the case of *Colling* v. *Treweek*, 9 D. & R. 460, and 6 B. & C. 398, and so say the treatises on evidence. 2 Phil. Ev. (6th Amer. ed.) 225. 1 Greenl. Ev. § 561. 2 Stark. Ev. (4th Amer. ed.) 974. See also *Swaine* v. *Lewis*, 5 Tyrw. 998, and 2 Cr., M. & R. 261.

Exceptions overruled.

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James W. Riley *vs.* Constant Taber.

An officer, who, after receiving an execution with notice that the claim on which the judgment had been recovered had been assigned to another person and was prosecuted at his cost, collects the amount of the execution and pays it to the nominal plaintiff, is liable in tort to the assignee for the amount of the costs in the action on the claim.

Writ of review of an action of tort brought by Richard Everett in the name of Taber against Riley as a deputy sheriff for official misfeasance.

At the trial of the review in the court of common pleas, there was evidence that Everett, in order to secure himself against liability as receiptor for property of Taber attached on mesne process, took an assignment from Taber of a claim against one Chace, which he agreed forthwith to sue, and did prosecute in Taber's name to judgment and execution, becoming liable for the costs of that suit. That execution was delivered to Riley, as deputy sheriff, with notice of Everett's interest, and directions to collect the amount of the execution and pay it to Everett. Riley collected the amount, and, upon its being claimed by both Taber and Everett, paid it to Taber. *Briggs*, J. instructed the jury that if Everett did not authorize Riley to make such payment to Taber, the costs of the suit against Chace, which Everett had paid, could be recovered in this action. The jury found a verdict for the defendant in review, and the plaintiff in review alleged exceptions.

B. Sanford, for the plaintiff in review.

E. H. Bennett, for the defendant in review.

Merrick, J. It is contended by the plaintiff in review that if it appears from the facts agreed that he ought to have paid over to Everett any part of the money collected by him on the execution of Taber against Chace, the omission to do so was a direct and immediate injury to Everett, for which he was entitled to an action in his own name, and on account of which he could maintain none in the name of Taber. It is upon this ground alone that he objects to the correctness and regularity of

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the proceedings in the original action, and upon which he claims to be entitled to judgment in this.

But the objection appears to be founded upon an entire misapprehension of the rights of the parties. No rules of law are more clear or better established than those which relate to the assignment of choses in action. The equitable assignee cannot maintain an action in his own name to collect a debt or enforce a remedy; but he may in the name of the assignee. And neither payment, nor a release or discharge by the assignee, after notice of the assignment, is ever allowed to affect the rights of the parties or to interfere in the least degree with the assignee in the prosecution and maintenance of his claim. *Brigham* v. *Clark*, 20 Pick. 43. *Clapp* v. *Shepard*, 2 Met. 127. *Jones* v. *Witter*, 13 Mass. 304. *Dunn* v. *Snell*, 15 Mass. 481. There is no doubt that Everett was the equitable assignee of the debt due from Chace to Taber, and that the judgment recovered was in the suit prosecuted by him and at his expense and for his benefit. Of all this the plaintiff in review had full knowledge before the payment to Taber of the balance of the execution which, in his official capacity, he had collected of Chace under and by force of it. He was therefore liable to Everett still; and he, as equitable assignee, alike of the original cause of action, the judgment recovered and the execution thereon, had a right to prosecute any and every needful suit to make his remedy complete. The verdict in his behalf was therefore right, and he is entitled to judgment upon it.

Exceptions overruled.

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William M. Colwell *vs.* Harvey M. Richards.

A receiptor agreed to keep chattels attached on mesne process until the attaching officer should call for them, and then deliver them to him, and further agreed to indemnify the officer against "all costs, trouble or expense that shall arise to him through any default in consequence of his entrusting said property in my hands." The receiptor delivered the chattels to the owner, who disposed of them, and the officer, upon a demand made upon him within thirty days after judgment, was obliged to satisfy the execution. *Held*, that the receiptor was liable to him, upon a demand made after the expiration of the thirty days.

Action of contract upon a receipt signed by the defendant, which recited that the plaintiff had delivered to him certain chattels, attached by the plaintiff as deputy sheriff on mesne process in favor of Elizabeth Newhall against Thaddeus Phelps; and concluded thus: "In consideration thereof, I promise safely to keep the aforesaid property until the said William H. Colwell or his order shall call for it, then to deliver it to him or his order at such a time and place as he shall appoint, in like good order and condition as the same now is in; and I do further promise, that I will save and keep harmless the said William H. Colwell from all costs, trouble and expense that shall arise to him through my default in consequence of his entrusting said property in my hands."

The parties agreed upon a statement of facts, admitting that the plaintiff, when this receipt was made, was a deputy sheriff, and that the facts recited therein were true. The residue of the statement was as follows:

The property thus put into the hands of the defendant was immediately delivered by him to Phelps, who, while the action against him was pending, mortgaged it for its full value to a person ignorant of the attachment. The plaintiff in that action recovered judgment therein on the 17th of January 1857, for debt and costs of suit, and took out execution therefor on the 14th of February 1857, which on the 16th of February, after the plaintiff was out of office, was delivered to Joshua Lothrop, a deputy sheriff, with instructions to make a demand upon the

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plaintiff for the property attached; and, if the fact may be proved by parol, it is agreed that on the same day Lothrop duly demanded of the plaintiff said property, and the plaintiff thereupon delivered to Lothrop the contract in suit, first indorsing upon it a request to the defendant to deliver to Lothrop the property therein named. No demand for said property was made upon the defendant until more than thirty days after said judgment; but one was made before the commencement of this action, and the defendant refused to deliver it. Lothrop returned on the execution that he had made diligent search and could find no property of Phelps, and therefore returned the execution in no part satisfied. And it is still unsatisfied. The plaintiff has settled with Newhall, the plaintiff in the former suit.

If, on the foregoing facts, the plaintiff can maintain this action, he is to have judgment for the amount of the above execution. Otherwise, the judgment is to be for the defendant.

C. I. Reed & W. W. Blodgett, for the plaintiff.

C. B. Farnsworth, for the defendant. The attachment was dissolved in thirty days after judgment; and as no demand was made on the defendant for the property within that time, he is discharged. The defendant ought not to be held in such a case, except on an early notice; for, as he is a mere surety, he should have an opportunity to secure himself.

The fact that the plaintiff was in fault, by not having the property ready to deliver up on demand made on him, cannot affect the defendant's liability; for he only promised to be responsible for his own default.

Shaw, C. J. This receipt was an obligation to indemnify the officer, as well as to keep the property. The officer by a demand within thirty days was made liable for the amount of the property, and to that extent was damnified, and the defendant, having delivered the property to the debtor, and thereby dissolved the attachment, is liable. *Webster* v. *Coffin*, 14 Mass. 196. *Lawrence* v. *Rice*, 12 Met. 536.

Judgment for the plaintiff.

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HALSEY D. WOLCOTT & another *vs.* BOSTON FAUCET COMPANY.

It is no defence to an action by the payee on a negotiable promissory note, that the plaintiff had pledged it to a third person as collateral security for a debt of which he had since tendered payment, which the pledgee refused to receive or to give up the note.

ACTION OF CONTRACT upon a promissory note made by the defendants, payable to the plaintiffs' order. Answer, that the payees and nominal plaintiffs pledged the note, without indorsing it, to Ellis B. Pitcher, as collateral security for a debt due from them to him, and, before the note became due, tendered to Pitcher payment of the debt, and demanded the note, but that Pitcher refused to return it, and after its maturity commenced this action without the authority or consent of the payees. The plaintiffs demurred to the answer, as setting forth no legal defence.

C. B. Farnsworth, for the plaintiffs. The defendants have no right to set up this defence. It does not concern them. Pitcher, the pledgee, once had a right of action on the note. The tender did not affect that right. *Jarvis* v. *Rogers*, 15 Mass. 389. *Stearns* v. *Marsh*, 4 Denio, 227.

E. H. Bennett, for the defendants. If the plaintiffs had in fact paid the debt for which the note was pledged to Pitcher, his right to sue on it in the name of the pledger would have ceased. *Bowditch* v. *Green*, 3 Met. 360. *Parks* v. *Hall*, 2 Pick. 206. The tender of the debt has the same effect. Story on Bailments, § 346.

BY THE COURT. The answer is insufficient. If the facts pleaded were true, they showed a revocation of the authority to Pitcher, but no bar to the action, of which the defendants could avail themselves. If the promisees, plaintiffs of record, come in and disclaim, it will be different.

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Caleb P. Lobdell *vs.* Avery D. Allen.

If, after the execution of an indenture of apprenticeship at common law in this commonwealth by the father and the master of the apprentice, with covenants that the apprentice shall serve the master faithfully for a term of years, and shall board with his father at a certain rate as long as the latter shall be disposed to board him, the master removes with the apprentice to another state with his and his father's consent, the father, if he subsequently takes his son away before the expiration of the term, is liable for breach of his covenants. *Aliter, it seems*, if the apprentice had been taken to the other state without the father's consent.

Action of contract to recover damages for the breach of covenants in the following indenture of apprenticeship, whereby the defendant's son was bound to the plaintiff.

"This indenture, made this first day of May 1854, by and between Avery D. Allen of Mansfield, county of Bristol, tailor, and C. P. Lobdell of Mansfield, county of Bristol, Witnesseth: That the said A. D. Allen, in consideration of the covenants and agreements of the said C. P. Lobdell, hereinafter set forth and described, and in accordance with the consent and wishes of his son William A., who signifies his assent by subscribing their indenture, doth intrust, bind and hereby indent, the said William A. to the said C. P. Lobdell, to learn the art and trade of marble working, and all its branches, as done at the shop of said Lobdell, and with him as an apprentice to serve from the day of the date of this indenture until the first day of May in the year 1858;" and the defendant covenants with the plaintiff "that for and during the term aforesaid the said William A. shall well, truly and faithfully serve him, and shall give and devote to him his time and labor; that he shall not destroy or injure the property of the said Lobdell, but shall endeavor to advance the interest and benefit of his business, and shall conduct himself in a temperate, honest and industrious manner;" and Lobdell covenants to instruct the apprentice and supply him with suitable board and lodging, and pay him certain specified sums quarterly; and it is further agreed that the apprentice shall board with his father as long as the latter shall be disposed to board him, for the sum of $100 per an-

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num, payable quarterly; "and the said William A. signifies his assent to the terms and covenants of this indenture, and promises to keep and perform the same on his part."

At the trial in the court of common pleas, before *Mellen*, C. J., it appeared that the plaintiff was a worker in marble, having his residence and place of business in Mansfield, where the defendant and the apprentice also resided and now reside; and in April 1855 opened another shop for carrying on his business in Providence in the State of Rhode Island, between one and two miles from the State line, still continuing for a time his former shop in Mansfield, and continuing to live there until July 1855, when he removed with his family to Providence; that the defendant's son continued to work in the shop in Mansfield until about three weeks after the plaintiff removed to Providence, when the plaintiff informed him that he could go to Providence or remain in Mansfield, as he chose; and that soon after this he, of his own accord, and with the acquiescence of the defendant, went to work in the plaintiff's shop in Providence, and there continued for about a week, at the end of which time he, without any notice to the plaintiff, left with the acquiescence of the defendant, (which was the breach relied on,) and had not since performed any work for the plaintiff under the indenture; that the plaintiff, soon after the apprentice left the plaintiff's shop in Providence, closed his shop in Mansfield; and had neither offered nor furnished any work to the defendant's son in this commonwealth since he left as aforesaid; nor had the defendant or his son requested the plaintiff to furnish such, or offered to perform any more work for the plaintiff in this commonwealth or elsewhere.

The plaintiff offered evidence tending to show that the defendant and his son consented to the removal of the plaintiff out of the Commonwealth, and to his son's accompanying him and completing his apprenticeship at Providence. The defendant objected to the admission of this testimony. But the court admitted it.

The defendant asked the court to instruct the jury that "if the plaintiff, to whom the apprentice was bound by the inden-

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ture, removed out of the Commonwealth, and, with the assent of the apprentice and of the defendant, took the minor apprentice with him out of the State to work and live, and while so out of the State the apprentice left the plaintiff with the assent of the defendant, the plaintiff can therefor maintain no action upon the indenture against the defendant living in this state." But the court declined so to instruct the jury. Thereupon the defendant requested the court to instruct the jury that "the plaintiff had no right to carry the defendant's son out of this commonwealth to work at his business except with the assent of the defendant and the defendant's son; and that if both father and son did so assent, yet they might at any time reclaim their rights under the indenture and the law, and the defendant's son might leave the plaintiff while out of the State, and no action could be maintained therefor upon the indenture against the defendant." The court declined so to instruct the jury, but instructed them "that the plaintiff had no right to compel the apprentice to accompany him out of the Commonwealth to fulfil the stipulations in the indentures; but that if the defendant and his son assented to such change as aforesaid, and he went and worked and lived with the plaintiff, in Providence, in pursuance thereof, this would affirm and revive the stipulations of the indentures, and the defendant could not afterwards withdraw his assent and repudiate the stipulations, but would be liable for the son's leaving the plaintiff's employ." The verdict was for the plaintiff, and the defendant alleged exceptions.

C. I. Reed, for the defendant. 1. No covenant in the indenture has been broken by the defendant; for when an indenture of apprenticeship is made in this state between parties living here, although no place is mentioned therein in which the service is to be performed, yet by intendment of law it is to be done in this state; and it seems to be well settled that a master has no right, by virtue of the indenture, to carry his apprentice out of the State, and if he does so, the contract created by the indenture is no longer binding on the apprentice. *Ayer* v. *Chase*, 19 Pick. 556. *Randall* v. *Rotch*, 12 Pick. 107. *Coffin* v. *Bassett*, 2 Pick. 357. *Powers* v. *Ware*, 2 Pick. 451. *Hall* v. *Gardner*,

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1 Mass. 172. *Davis* v. *Coburn*, 8 Mass. 299. *Himes* v. *Howes* 13 Met. 80. *Commonwealth* v. *Deacon*, 6 S. & R. 526. *Commonwealth* v. *Edwards*, 6 Binn. 202. *Olney* v. *Myers*, 2 Scam. 311. *Vickere* v. *Pierce*, 3 Fairf. 315. *Coventry* v. *Woodhall*, Hob. 134.

2. So in this case if the plaintiff rightfully carried the defendant's son into Rhode Island, it was by virtue of some agreement or contract aside from and independent of the indenture declared upon, and if that agreement or contract has been violated, the action should have been brought for that, and not on the indenture.

E. H. Bennett, for the plaintiff. 1. This action is not against the apprentice, but against his father for breach of his covenant, made on good consideration, that his son should faithfully serve the plaintiff for four years. Such a covenant is binding upon the father at common law, whether the son be legally bound or not. The son was not bound to go to Providence, but his father is liable in damages for his not going. *Whitley* v. *Loftus*, 8 Mod. 190. *Branch* v. *Ewington*, 2 Doug. 518. *Cuming* v. *Hill*, 3 B. & Ald. 59. *Day* v. *Everett*, 7 Mass. 145. *Phelps* v. *Townsend*, 8 Pick. 392. *Fowler* v. *Hollenbeck*, 9 Barb. 309. *Van Dorn* v. *Young*, 13 Barb. 286. Rev. Sts. *c.* 80, § 26.

In this case the covenant is direct on the part of the parent towards the plaintiff, binding him to see it fulfilled or pay the damages, and is distinguishable in this respect from *Blunt* v. *Melcher*, 2 Mass. 228, and *Holbrook* v. *Bullard*, 10 Pick. 68.

2. If the father would not have been liable, had the son refused to go out of the State, yet the parties having consented to it, the covenant is continued in force, at least as to the father, and as to him it stands as if the plaintiff had been living out of the State when the indenture was first made. Although this might not bind the son, had he been a minor, (since it would not be within the statute, and not at common law, since an infant may avoid such a contract,) yet the father would be bound. *Olney* v. *Myers*, 2 Scam. 311. *Burden* v. *Skinner*, 3 Day, 126. Just as the assignment of an apprentice, although not valid without consent, yet with that, it becomes a new apprenticeship, or the continuation of the old one, binding all

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concerned. *The King* v. *Stockland*, 1 Doug. 70. *Phelps* v. *Culver*, 6 Verm. 430. *Williams* v. *Finch*, 2 Barb. 208. *Nickerson* v. *Howard*, 19 Johns. 113. *Commonwealth* v. *Jones*, 3 S. & R. 158. *Commonwealth* v. *Leeds*, 1 Ashm. 405.

This case was decided at Boston in June 1858.

Dewey, J. The indenture upon which this action is brought is an indenture at common law, and not one made under the provisions of Rev. Sts. *c.* 80.

Such indentures at common law, although they may not have the benefit of the provisions of the statute to enforce their performance, are nevertheless good in law, and may subject the father, who thus stipulates for the services of a minor son, to respond in damages for the breach of his contract. *Day* v. *Everett*, 7 Mass. 149. Although it may not be obligatory on the minor, yet the father may be liable on his covenants.

But it is said that this was an indenture of apprenticeship made in this commonwealth between parties living here, and that although no place was stated in the indenture in which the service was to be performed, yet, by intendment of law, it was a contract for services to be performed in this commonwealth. We have no doubt such would be the construction to be given to an indenture under the revised statutes. We apprehend the same would be true of an indenture at common law, of the character of the one now before us, in the absence of anything to control such presumption or waive the benefits of it. If it were not so held, the effect would be to authorize the party to whom such services were secured to require the minor to remove to California, or even Australia.

In the present case, there is wanting not only any express stipulation looking to services elsewhere, but there are provisions in the indenture indicating quite the contrary. Such is the provision that the minor is to board with his father, as long as the father is disposed to board him for $100 dollars per annum, to be paid in equal proportions monthly. This seems to give a locality to the services to be rendered by the minor. But this was a condition or portion of the agreement that might be waived or modified by the consent of the parties. The case

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presents such waiver, or modification, made under circumstances which estop the defendant from setting up as a defence that the plaintiff had removed from the State of Massachusetts into the adjoining State of Rhode Island. The bill of exceptions finds that the plaintiff offered evidence tending to show that the defendant and the minor consented to the removal of the plaintiff out of the Commonwealth, and that the minor should accompany him and complete his apprenticeship at Providence, and performed actual services there under this assent. In reference to such evidence the instructions given were unobjectionable and sufficiently favorable to the defendant.

Exceptions overruled.

DAVID CUSHING & another *vs.* PAUL B. WORRICK.

Punctuation is not to be regarded in construing a statute.

In the construction of statutes, a limiting clause is to be restrained to the last antecedent, unless the subject matter requires a different construction.

After a dispute of some years' duration between a town and the proprietors of common lands therein, about the rights of taking seaweed from the shores and of feeding cattle on the lands, the legislature, upon the petition of said proprietors, and with the consent of the town, incorporated the proprietors by an act which defined the bounds of their lands, authorized them to erect certain gates and water fences at the ends thereof, and provided that the town should "be at the expense of the aforesaid gates and water fences," and "reserved to the town the privilege of the shores, and of feeding all lands, not comprehended within the aforementioned bounds." *Held*, that the town's privilege of the shores extended to those comprehended within said bounds; and was not forfeited by ceasing to maintain the gates and water fences.

ACTION OF TORT by lessees of the Proprietors of Common and Undivided Lands in Hull against an inhabitant of Hull, claiming under a license from the town, for taking seaweed from the easterly portion of Nantasket or Long Beach, to put upon his lands in Hull. The parties submitted the case to the judgment of the court upon a statement of facts, so much of which as is material to the understanding of the decision was as follows:

For some years previous to 1810 the rights of taking seaweed from the beaches, and of feeding cattle on the lands, had been

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in dispute between said proprietors and the town. In May 1810 said proprietors presented a petition to the legislature, representing that, in consequence of the town's never having particularly located a highway across these commons, the inhabitants had claimed and exercised a right of turning their cattle and sheep into the streets, whereby they had free communications with the commons; and praying for an act of incorporation "to enable the proprietors of these common rights to secure, manage, and dispose of the same, so as to secure their rights and best promote their interests."

On the 17th of November 1810 the town passed this vote: "Voted, not to oppose the petition of said proprietors, if the proprietors agree to let the town have the beaches; also all the feeding lands in the township from Stony Beach to the point that is enclosed by gates and water fences; also said town doth agree to give up to said proprietors all the feed that grows on the road leading through said commons. In consequence, said proprietors are to give up said beaches to the town, that is to say, said proprietors do give up to the town all said beaches rent for, be it more or less; then voted and agreed that the town pay for all the gates and water fences."

On the 22d of June 1811 the legislature passed an act incorporating said proprietors, &c. 1811, *c.* 56, the first section of which defined the boundaries of their lands, including the whole of Long Beach, and excluding that part of the town which extended from Stony Beach to the gates and water fences; and the third section declared that "the said proprietors shall have liberty to erect the following gates and water fences" at specified places at each end of the beach, "and the said town of Hull shall be at the expense of the aforesaid gates and water fences; reserving to any person the privilege of passing and repassing through said gates, as occasion may require; and the proprietors may have liberty to impose a penalty, not exceeding one dollar, for the neglect of any such person in not shutting said gates; and also reserving to the town of Hull the privilege of the shores, and of feeding all lands, not comprehended within the aforementioned bounds." The last comma was not in the

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act as passed to be engrossed; and the words "all lands" with the subsequent comma are interlined in the act as engrossed.

From the passage of this act until 1837, the town, with the knowledge of said proprietors, and without any interference, disposed of the seaweed on the beaches, and granted to their citizens the privilege of taking as much seaweed from the beaches as they desired to put upon lands occupied by them within the town. Said proprietors organized under the act of 1811 on the 5th of March 1812, and have since had exclusive possession of the lands described in the first section, except in so far as their possession of Long Beach is deemed to be controlled by the facts herein stated. For a long series of years, beginning as early as 1837, as shown by the votes of the town and of the proprietors, the right to manage the beaches has been in controversy between them. In 1838 the proprietors resumed the control of Long Beach, and voted that the gates and water fences be left down, and afterwards passed similar votes; but, notwithstanding their votes prohibiting it, and the town's knowledge thereof, citizens of Hull, not proprietors, have continued to a greater or less extent to take seaweed from that beach.

The town paid for the erection of the gates and water fences mentioned in the act of incorporation. But the increase of travel at Hull has been such, that since 1838 it has been impossible to keep up the gates and water fences, and they have not been kept up during that time.

J. A. Andrew & H. E. Hersey, for the plaintiffs.

E. G. Loring & D. Thaxter, for the defendant.

By the Court. We are of opinion that upon the facts agreed the defendant is entitled to judgment.

The plaintiffs claim under a lease from the Proprietors of Common and Undivided Lands in Hull; the defendant, under a general license from the inhabitants of Hull, to take seaweed from their lands. The question therefore is, whether the town or the proprietors have the better title to the seaweed, shells and other profits of the beach or shore, between high and low water mark.

Without going into the ancient title, it is enough to say that

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a controversy had arisen between the two corporations as to the right to the shores. The proprietors applied to the legislature to incorporate them. It is conceded on both sides that an order of notice was issued, and that the parties were both in attendance, and the act passed with the consent of both parties.

This act, after defining the boundaries of the lands of the corporation, and the places at which gates and water fences should be erected at the expense of the town, and "reserving to any person the privilege of passing and repassing through said gates as occasion may require," contains the following clause, upon which this case turns: "And also reserving to the town of Hull the privilege of the shores and of feeding all lands not comprehended within the aforementioned bounds."

The question is, whether "the privilege of the shores," including of course the right to take seaweed, is limited to shores "not comprehended within the aforementioned bounds." And the court are of opinion that this privilege is not so limited.

It is unnecessary to resort to the draft of the bill as passed to be engrossed, in order to explain the statute as actually engrossed; for the general rule is that punctuation is no part of a statute. Barrington on Sts. (5th ed.) 439, note. 3 Dane Ab. 558. Dwarris on Sts. (2d ed.) 601. And in this case the omission of the comma between "lands" and "comprehended" makes the case clear in favor of the defendants; while its insertion does no more than to make it grammatically possible to apply the limiting clause to the shores, as well as to the feeding lands. But such a clause is ordinarily to be confined to the last antecedent, unless there is something in the subject matter, which requires a different construction. Finch, lib. 1, *c.* 3. Noy's Max. (6th ed.) 2. Dwarris on Sts. 590, 591, and authorities cited.

The difference in the form of the two clauses strengthens this conclusion. The first term — "the shores" — is definite in form, and complete in meaning; the second — "all lands" — is indefinite, and needs some explanation to define it. A similar, though less marked, difference of expression is found in the town's vote of November 1810. A reference (if necessary,

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which it is not,) to that vote would leave no doubt of the agreement of the two corporations, upon which the statute in question was based.

The terms of the statute itself, though not entirely free from ambiguity, appear to us, for the reasons already stated, to confirm the privilege of the town in all the beaches. Such an act, passed with the consent of all parties interested, is binding. All objection to legislation affecting private rights is removed by consent. *Consensus tollit errorem. Volentibus non fit injuria.* And the construction which we adopt is the same which was acquiesced in by the parties for twenty six years succeeding the passage of the statute.

It was argued that if the town ever had any right to the Long Beach under this statute, the consideration thereof was the maintenance of the gates and water fences; and that the town, by ceasing to maintain them, had forfeited all rights under the statute. But we do not consider the rights secured to the town by the statute as conditional or dependent upon its forever maintaining the gates and fences. And the case shows that they were removed with the consent, if not by the act, of the Proprietors of Common and Undivided Lands.

Judgment for the defendant.

ENOCH D. YOUNG *vs.* INHABITANTS OF YARMOUTH.

A town is not liable for damages sustained by a traveller upon a highway by reason of a telegraph post erected within the limits of the highway by an electric telegraph company, in a place prescribed by the selectmen of the town, under *St.* 1849, *c.* 98, § 8.

ACTION OF TORT by a traveller upon a highway which the defendants were bound to keep in repair, for damages occasioned by being thrown from his carriage against a telegraph post.

At the trial before *Dewey, J.*, the evidence was that this post stood within the limits of the highway, between the sidewalk

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and the travelled part of the way, which was in good repair, and "built about one foot crowning," with a small gutter between it and the telegraph post, and that the distance between this post and a similar one on the opposite side of the travelled part of the way was twenty six feet.

It was admitted by the plaintiff that this post was one of a line erected upon and along said highway, by the Cape Cod Telegraph Company, incorporated for the purpose of electric telegraphing; and that said line of posts and the post complained of were erected in places prescribed by the selectmen of the town, as provided by *St.* 1849, *c.* 93, § 3.

The defendants requested the judge to instruct the jury that "under these circumstances the town of Yarmouth was not liable to the plaintiff for damages sustained by him by coming in contact with the telegraph post complained of, although the same may have been an obstruction, rendering the highway unsafe for the purposes of ordinary travel."

But the judge refused so to instruct the jury; and instructed them that "if they were satisfied that the telegraph post complained of was an obstruction, rendering the highway dangerous and unsafe for the purposes of ordinary travel, it would be such a defect in the highway as would render the town liable to any one injured thereby."

The jury returned a verdict for the plaintiff, and the judge reported the case to the full court.

S. N. Small, for the defendants.

D. U. Johnson, for the plaintiff. "All highways" must by statute "be kept in repair at the expense of the town, so that the same may be safe and convenient for travellers with their horses, carriages," &c. "at all seasons of the year." Rev. Sts. *c.* 25, §§ 1, 22. *Sts.* 1850, *c.* 5; 1851, *c.* 32.

The *St.* of 1849, *c.* 93, gives the selectmen no power to obstruct a highway. On the contrary, § 2 requires the telegraph lines to "be so constructed as not to incommode the public use of said highways;" and § 3, in order to prevent obstructions, gives to selectmen the power of locating the posts, determining what kind of posts shall be used, and altering their location. A

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delegation to a board of selectmen of power to obstruct highways would be unconstitutional, as against the right of every one "to be protected by society in the enjoyment of his life, liberty and property, according to standing laws." Declaration of Rights, art. 10. Such a construction would be unreasonable, and therefore should not be adopted. Min. Dig. Statutes, pl. 1. If selectmen in this manner can obstruct a highway slightly, they can do it entirely.

Towns are liable when private individuals obstruct the highways; *a fortiori*, when it is done by their own officers, whose duty it is to superintend the safety of the roads.

Dewey, J. This case, as presented upon the evidence, failed to establish a case of an obstruction of the highway by the telegraph posts, that rendered the highway unsafe for the purposes of ordinary travel, and the verdict might properly be set aside for that cause. But the law applicable to the case will, when stated, be found to be so far decisive against the claim of the plaintiff, as to leave nothing to be submitted to the jury.

The questions presented are of the effect of a location of telegraph posts in the highway, by a corporation duly established by law, and in places specified in writing by the selectmen, pursuant to *St.* 1849, *c.* 93; and whether any responsibility rests upon the town in which they are located, if a traveller upon the highway should find them an obstruction for the purposes of travel, or receive any injury in his person or property by reason thereof.

The defendants contend that the town of Yarmouth was not responsible for any obstruction or injury thus occasioned; that inasmuch as the telegraph posts were authorized by law to be thus placed in the limits of the highway, and the town of Yarmouth had no right to remove them, their existence in the highway could not be such a defect in the highway as would make the town liable for damages sustained therefrom by a traveller. The *St.* of 1849, *c.* 93, § 2, gives the authority to any company, incorporated for this purpose, to "construct lines of electric telegraphs upon and along any of the highways, by the erection of the necessary fixtures, including posts," &c. "provided the

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same shall be so constructed as not to incommode the public use of said highway." If this had been the entire provision contained in this statute, it might have warranted the position taken by the plaintiff, and the instructions given to the jury that if the telegraph post complained of was an obstruction rendering the highway dangerous and unsafe for the purposes of ordinary travel, it would be such a defect as might render the town liable to any one injured thereby. It would be so because such erection of posts would have been an unauthorized act, and the duty of the town of Yarmouth would have been to require their immediate removal. The authority given to the telegraph companies thus to operate upon the public highways would have been strictly limited to the cases provided in the statute, and whether the posts were improperly placed might have been a question for the jury to pass upon.

But § 3 of this statute has made further provisions, which seem to have placed this matter wholly under the supervision of the selectmen of the town through which the lines of such company are to pass. The selectmen are to specify in writing where the posts may be located, &c., "which writing shall be recorded in said town, and such company, in building its line, shall follow the regulations of such writing." It is also further provided that "after the erection of said telegraph lines, the selectmen shall have power to direct any alteration in the location or erection of said posts." These provisions clearly indicate the selection of a legally constituted board to adjudicate upon this subject, with full powers to revise their doings, and correct any errors which the practical working of the first specification and arrangements as to the location of such posts may seem to require. The members of this tribunal do not act as agents of the town in this matter, but for the public generally, and must in the discharge of their duties give effect to the requirement of the statute that the posts should not be so placed as to incommode the public use of the highway. There seems to be no provision for an appeal from the judgment of the selectmen in this matter, either in behalf of the town, or of the telegraph company. The consequence of this necessarily must

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be that the location of the telegraph posts by the selectmen is conclusive upon all parties. The town cannot interfere and remove them; and their existence upon the highway, if in exact conformity with the regulations prescribed by the selectmen, does not constitute any defect or want of repair in the highway, for which the town can be held responsible in case of any injury thereby occasioned to any person travelling on such highway. If an improper location of telegraph posts has been allowed by the selectmen, the power is fully vested in the selectmen of the town to direct an alteration in such location, and thus obviate any inconveniences that may be found to exist to the traveller or the public generally. But this is not a matter which the town in its corporate capacity can regulate, or for which the town is responsible. Holding this view of the law applicable to this subject, the result must be that the verdict for the plaintiff must be set aside. *New trial ordered.*

JOHN C. HASKINS *vs.* JOSEPH P. HASKINS.

The use of a mill privilege purchased from the owner of a lower privilege on the same stream is not regulated by the use made of it before such purchase, but by what is reasonable and proper, conformably to the wants and usages of the community.

In a civil case the jury were instructed that the burden of proof was upon the plaintiff, and was sustained "if upon the whole proof there was a preponderance of evidence, that is to say a balance of the probabilities of the case, in his favor." *Held*, that the explanation was indefinite, and tended to mislead the jury.

ACTION OF TORT for filling up and obstructing the plaintiff's mill pond and stream, by sawdust and shavings from a box-board machine at the defendant's mill, above the plaintiff's on the same stream.

At the trial in the court of common pleas before *Sanger*, J., it appeared that the defendant purchased his mill and privilege of the plaintiff in 1846, previously to which the plaintiff had used said mill as a shingle mill, and suffered the dust therefrom to fall into the pond and stream now the plaintiff's. There

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was conflicting evidence upon the comparative amount of sawdust and consequent obstruction of the plaintiff's pond and stream before and since that purchase.

The defendant requested the court to instruct the jury "that, under the law, by virtue of the conveyance from the plaintiff to the defendant, the defendant acquired the right to use the mill in substantially the same manner as it was used while owned by the plaintiff; that if new machinery was invented subsequently, by means of which the defendant could do more work, he would have a right to adopt it and run it, although the effect would be to throw more dust into the plaintiff's pond; and the defendant was not restricted to the precise use which had been before made of the privilege, nor to the precise quantity and character of sawdust before suffered to fall into the stream;" and "that the plaintiff could not recover for a merely theoretical damage, but the damage must be actual and appreciable, and that if the jury should find that there was, at the date of the writ and previously, more sawdust in the plaintiff's pond than before the box-board machine was introduced, yet if they found that the plaintiff could run his mill substantially as before, the plaintiff could not recover."

The court instructed the jury "that by virtue of the conveyance from the plaintiff to the defendant, the defendant did acquire the right to use the mill substantially as it was used while owned by the plaintiff, and was not restricted to the precise use which had been before made of the privilege, nor to the precise quantity or character of the sawdust before permitted to fall into the stream; and could use new and improved machinery, if thereby the quantity and character of the sawdust, permitted by the defendant to fall into the stream, was substantially the same as when the mill was owned by the plaintiff; but if the sawdust, permitted by the defendant to fall into the stream from his box-board machine, was substantially different in character or quantity, and the plaintiff's stream, pond and mill privilege were thereby obstructed and injured, the plaintiff could recover such damage therefor as he had actually suffered thereby."

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The court further instructed the jury "that the burden of proof was on the plaintiff to make out the injury set forth in his declaration; that this burden would be sustained, if upon the whole proof there was a preponderance of evidence, that is to say a balance of the probabilities of the case, in his favor." The jury found for the plaintiff, and the defendant alleged exceptions.

C. I. Reed, for the defendant.

T. D. Robinson, for the plaintiff.

Bigelow, J. The rights of the parties to the use of their mills respectively did not depend on the fact that the defendant held his title to his mill privilege under a conveyance from the plaintiff. Irrespectively of the mode in which the parties acquired title to the mill privileges, each had the right to use the water belonging to his mill in a reasonable, ordinary and proper manner for the regular and usual prosecution of his business. Such use of the water by one millowner, although it might impair in some degree the efficiency of the mill privilege of another owner on the same stream, would give no right of action to the latter. It would be *damnum absque injuria*. *Cary* v. *Daniels*, 8 Met. 476. *Barrett* v. *Parsons*, 10 Cush. 367. The real issue before the jury therefore, in the present case, was not as to the manner in which the plaintiff had used the upper mill and the pond below the same, while it was owned by him and before it was conveyed to the defendant; but whether the latter, since he became the owner of the upper mill, had used his privilege in a reasonable and proper manner, conformably to the usages and wants of the community, and in a mode not inconsistent with a like reasonable and proper use of the plaintiff's mill situated on the same stream below. By the case as stated in the exceptions, it would seem that the trial of this case proceeded on a misapprehension of the true question at issue, and that the jury may have been thereby misled into an erroneous view of the rights of the parties.

We are apprehensive that they were also misled by the instructions of the court as to the amount of proof necessary to warrant them in finding a verdict for the plaintiff. If the judge

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had gone no further than to tell the jury that the burden of proof was on the plaintiff, and that this burden would be sustained if on the whole evidence there was a preponderance of proof in his favor, his instruction would have been intelligible, precise, and strictly correct. The "weight" or "preponderance of proof" is a phrase constantly used, the meaning of which is well understood and easily defined. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. But the phrase "balance of probabilities," used by the judge in his instructions as equivalent to the words "preponderance of proof," has no well settled or clearly defined meaning. It is at best a vague and indefinite phrase, and would rather lead the jury to infer that they might form their verdict on a guess at the truth, gathered from the evidence, than on a real solid conviction of it, founded on a careful scrutiny and examination of the proof. We cannot sanction an instruction which seems to us to introduce into the practical administration of justice a new phrase of doubtful signification, which tends to cloud the meaning of that which was before clear and well understood, and to confuse and mislead the jury in the discharge of their duty.

Exceptions sustained.

EDWARD WILDER *vs.* EDMUND FRENCH.

A contract to "do, perform and expend labor in the erection, alteration and repair" of a house, at a certain rate by the day, is too indefinite to support a lien under *St.* 1852, *c.* 307, § 1, for the labor of the contractor and his workmen; and, if thus stated in the petition, cannot be shown to have been more specific.

PETITION under *St.* 1852, *c.* 307, for the enforcement of a mechanic's lien. Trial and verdict for the petitioner in the court of common pleas, before *Sanger*, J., to whose rulings the respondent alleged exceptions.

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P. Simmons, for the respondent.

N. C. Berry, for the petitioner.

Merrick, J. This is a proceeding under the statutes to secure to mechanics and laborers payment for their labor by a lien on real estate. And it is apparent that the claim is made under the provisions of the *St.* of 1852, *c.* 307, because the charges which constitute the aggregate of the account prefixed to the certificate of the petitioner and sworn to by him, are not made alone for his own personal services, but comprehend also the compensation to be paid to him for the work which was done by others who were in his employment. The *St.* of 1851, *c.* 343, secured a lien only in behalf of the person whose wages were earned by his own actual labor. And it does not appear with any certainty, certainly not with any distinctness upon the record, that any portion of the labor for which charges are made by the petitioner was performed personally by him. In his answer to the petition, the respondent denies that the labor, for which the petitioner is seeking to obtain payment by applying the proceeds of the sale of the land on which it was performed to that purpose, was done in pursuance of any contract sufficient under the provisions of law to entitle him to the lien which he endeavors to establish. To effect this purpose, the petitioner must of course rely upon the contract which he has set forth in his petition. He cannot be allowed to fasten an incumbrance upon the respondent's land by proving upon the trial another and different agreement between the parties.

It is alleged in the petition that the petitioner contracted and agreed with the respondent to "do, perform and expend labor in the erection, alteration and repair of a dwelling-house and out buildings" on certain land belonging to him, and to receive compensation therefor at the rate of one dollar and eighty three cents for each day's work performed; that this price was in fact charged for all the work which was done from the time the work under the contract was commenced until the first day of January then next afterwards; after which time the rate of compensation was reduced by the mutual consent of the parties to one dollar and fifty cents for each future day's work. There is no state-

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ment of any specific thing which by the terms of the contract was to be done, or of any fixed period of time during which the work to be supplied should continue to be performed. The contract thus set forth is altogether uncertain and indefinite, both as to the period of its duration and the objects and purposes proposed to be accomplished. There is no limitation in it of time within which the labor to be furnished by the petitioner is to be continued, or within which it may be terminated, and nothing precise and certain as to the objects upon which the labor may or shall be expended. It may be applied either to the erection of a new house, or to the repair of an old one which already exists, or to the erection or repair of one or many out buildings on the land. In both of these respects the contract is vague and indeterminate. Such an agreement was a mere stipulation for the employment of the petitioner and of such other workmen as he should have in his service, by the day, for an indefinite period, and until one or the other of the parties should choose to stop the further continuance of any work, and thus bring the contract to a close.

This is not such a contract as will, when labor has not only been actually performed by the contractor, but has also been expended and supplied by him by the services of other persons in his employment and working on his account, create a lien upon real estate for the entire amount of money which may have thus been earned. The statute provides, among other things, that any person to whom money shall be due for labor expended in the erection or repair of a building shall have a lien upon the building and the lot of land on which it stands, for his security, to an amount "not exceeding the amount of the contract." St. 1852, c. 307, § 1. This plainly shows that the contract under which a lien may arise must be of such character, and upon such terms and stipulations between the parties, that the amount which may be earned under it may in some way be ascertained and determined with precision and certainty. It must be so, because such a conclusion is indispensable to define and fix the rights of the parties. It is thus to be ascertained on the one hand to what amount the contractor for labor may insist upon

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establishing an incumbrance upon the land, and on the other within what limits the owner, or any subsequent party in interest, may insist upon its being restrained. The contract then, which will enable the contractor to fix and maintain a lien upon real estate, must be in express terms and for the accomplishment of a definite purpose. It would undoubtedly be sufficient if it provided for any designated object, such, for instance, as the erection of a dwelling-house, the repair of the whole or of any definite part of a building, to be completed within a specified time and at a fixed and stipulated price, or for a sum to be ascertained by computation, allowing for the labor actually expended, at an agreed rate of compensation for each day's labor. But in some way or other it must under this statute be made so definite and certain, that the amount which may be earned and become due upon a performance of its stipulations will not be wholly without limitation both as to that which is to be done and the time during which the labor is to be continued. A contract for mere days' work, such as is set forth in the petition, is not of this character; and therefore it is no sufficient foundation upon which a lien upon real estate can be established.

In recurring to the bill of exceptions, it appears that the petitioner, upon the trial, produced evidence tending to show that there was a contract between the parties more specific and precise than that which is set forth in the petition. But there can be no judgment, except upon the petition and the allegations it contains. If the facts therein stated do not show that a lien upon the land described may or can have been created, no order can be made nor judgment rendered for its sale; and no further effectual proceedings can be had, whatever may have been the disclosures in evidence, unless it may be upon an application for, and an allowance of, an amendment of the petition. Rev. Sts. *c.* 117, § 6. In its present form it cannot be maintained.

Exceptions sustained.

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John Bent & another *vs.* George W. Cobb & another.

A guardian, who acts as auctioneer in selling land of his ward under license of court, is not authorized as such to sign for the purchaser a memorandum in writing to take the sale out of the statute of frauds.

Action of contract by guardians on a sale by auction of land of their ward pursuant to a license of the judge of probate. Answer, the statute of frauds.

At the trial in the court of common pleas it appeared that one of the plaintiffs was the auctioneer at said sale, and on the same day made a memorandum thereof in writing, and signed it with his own name as "guardian and auctioneer;" but the defendants refused to accept a deed or pay the price. The defendants objected that a seller and plaintiff was not authorized to sign a memorandum as agent of the purchasers. But *Sanger*, J. overruled the objection. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

E. Ames, for the defendants.

J. A. Andrew, for the plaintiffs.

Bigelow, J. The memorandum of the contract, on which the plaintiff relies to take the case out of the operation of the statute of frauds, is in our judgment insufficient, because it is not signed by the defendant, or by "any person thereunto by him lawfully authorized." In all cases of sales by auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum of a contract or agreement is binding on both. He is the agent of the vendor by virtue of his employment to make the sale, and he is made the agent of the vendee by the act of the latter in giving him his bid and receiving from him without objection the announcement that the property sold is knocked off to him as purchaser. But this rule is not applicable to cases where the auctioneer is also himself the vendor. The great mischief intended to be prevented by the statute would still exist, if one party to a contract could make a memorandum of it which would absolutely bind the other. If

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such were its true construction, it would be a feeble security against fraud; or rather it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract binding on the purchaser, he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale. The publicity of a sale by auction would be no safeguard against a false statement of the terms of sale, made in the written memorandum signed by a party acting in the double capacity of auctioneer and vendor. The chief reason in support of the rule, that an auctioneer, acting solely as such, may be the agent of both parties to bind them by his memorandum, is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract and the party in interest also. The purpose of the statute was, that a contract should not be binding unless it was in writing and signed by the party himself to be charged thereby, or by some third person in his behalf, not a party to the contract, who might impartially note its contents.

Nor can it make any difference as to the power of the vendor to make a memorandum binding on the vendee, that the sale is made by the former in a representative or fiduciary character as an executor, administrator, guardian or trustee. He is still the party to the contract, the price is to be paid to him, he is to deal with the purchase money; his interest and bias would naturally be in favor of those whom he represented, and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to those of the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties. We do not mean to say that a contract would not be binding, made by an auctioneer, where, from the form in which it was written, an action might be brought to enforce the contract in his name. In such case, if he was only the nominal party to the contract and the record, not being himself the vendor, and having no

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interest in the sale except as auctioneer, his memorandum might be sufficient to bind both parties to the contract. But we confine our opinion to the case at bar, where the auctioneer was the vendor and a party having an interest, greater or less, in the contract, as well as a party to it in terms. *Wright* v. *Dannah* 2 Campb. 203. *Farebrother* v. *Simmons*, 5 B. & Ald. 333. *Rayner* v. *Linthorne*, 2 Car. & P. 124. *Bird* v. *Boulter*, 4 B. & Ad. 443, and 1 Nev. & Man. 313. *Smith* v. *Arnold*, 5 Mason, 417. *Exceptions sustained.*

JULIA MURPHY *vs.* JOHN SPENCE.

Under *St.* 1857, *c.* 305, the complainant in a bastardy process is a competent witness for all purposes, including the fact of her having accused the respondent in the time of her travail.

It is no ground of dismissing a bastardy process, that the record of the justice before whom it was commenced states that he found the respondent guilty, and not that he adjudged him to be the father of the child.

Objections to the form of a complaint filed in the court of common pleas under the bastardy act cannot be first taken in this court to which the case has been brought on other exceptions.

BASTARDY PROCESS. The record of the justice of the peace, to whom the complaint was originally made, after stating the complaint and warrant, the defendant's arraignment and plea of not guilty, stated that "after due and full examination it is considered by" the justice "that he is guilty of the offence charged here against him," and he was ordered to give bond for his appearance at August term 1857 of the court of common pleas. The trial in that court was had before *Sanger*, J., who allowed this bill of exceptions:

"The proceedings before the justice and the new complaint filed in this court may be referred to as part hereof. The defendant put in the plea of not guilty, upon which issue was joined and a verdict found for the complainant.

"At the trial in this court the respondent moved orally that

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the proceedings be dismissed because it did not appear that the respondent was adjudged by the justice to be the father of the child. The court did not dismiss the proceedings.

"Without any preliminary proof from other witnesses, that during her travail, and before the delivery of the child, she had accused the respondent with being its father, the complainant was permitted, against the respondent's objections, to testify, and she was the only witness for the complainant. From her cross-examination and from the testimony of a witness introduced by the respondent, which tended to prove, as the respondent claimed, that the complainant had made statements at the preliminary examination, inconsistent with her testimony at this trial, the respondent contended that her testimony was contradictory and unworthy of belief.

"After the arguments of counsel, there being no request of counsel for special instructions, the court instructed the jury in regard to the case, and to these instructions no exceptions were taken.

"After the court had finished summing up to the jury, the respondent prayed the court to instruct the jury that if the complainant had given contradictory statements as to the time and place when the child was begotten, or did not know when it was begotten, she had not been constant in her accusation, and the complaint was not supported; and that if they believed she had falsified in either examination, she was not now to be believed unless supported by other testimony than her own. And the court thereupon further instructed the jury that she had been constant in her accusation, if she had uniformly accused the respondent and no other person with being the father of the child; and if from all the testimony they believed the respondent was the father of the child, begotten substantially as set forth in the complaint, they should find the respondent guilty; and that they should not rely upon the testimony of the complainant, if they believed that she had intentionally sworn falsely as to any matter. To which rulings the respondent excepts."

At the argument in this court, the respondent objected that the complaint filed in the court of common pleas was insuffi-

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cient, because it did not allege the time and place of begetting the child, nor that the complainant accused the respondent at the birth and before the delivery.

P. Simmons, for the respondent.

D. U. Johnson, for the complainant.

SHAW, C. J. That the complainant should have charged the respondent in the time of her travail is a condition precedent to maintaining her complaint. Under the former law, she could only be a witness, on proving such accusation by another witness. But by St. 1857, *c.* 305, she is made a competent witness, because this is a civil proceeding. *Reardon* v. *Russell*, *ante*, 366. She is therefore a witness for all purposes, and may testify to the fact of such accusation.

The other rulings at the trial were right. The objections not made at the trial are not open now. *Exceptions overruled.*

NOAH P. FORD *vs.* AMERICUS V. TIRRELL.

In an action on an agreement to build an octagonal cellar wall at a certain price by the foot, evidence of the usage of measuring the angles of such walls, and of the proper mode of measuring the angles of rectangular walls, is admissible.

On money due for labor, interest may be recovered after a demand of payment made at the expiration of a reasonable time.

ACTION OF CONTRACT for work and labor in building a cellar wall. At the trial in the court of common pleas, before *Sanger*, J., it appeared in evidence that the labor was done under a simple agreement by the plaintiff to build the wall of an octagonal cellar for the defendant, at the rate of eleven cents a foot. The only question was as to the mode of measurement; the defendant contending that the inner face of the wall should be the rule; the plaintiff, that an additional allowance should be made for the necessary work at the angles to support the building.

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Contradictory evidence was introduced of the proper mode and the local usage of measuring cellar walls. One of the witnesses called by the plaintiff was allowed, against the defendant's objection, to testify to the mode of measuring walls of rectangular cellars, and that he thought this wall should be measured in the same way.

The court instructed the jury "that as the contract was silent as to the mode of measurement of the wall, if there was a general custom or usage among the builders of cellar walls in that vicinity, by which such walls were measured, the parties would be supposed to have contracted according to such usage, and the jury should follow such usage in their measurement of the wall in dispute; but if there was no such general custom or usage, the jury should make such a measurement of the wall, as from all the testimony in the case they were satisfied was a just and proper measurement."

The court further instructed the jury that if they should find for the plaintiff, and that he had demanded payment at the expiration of a reasonable time from the completion of the work, they should allow him interest from the time of such demand; otherwise, from the date of the writ.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. Simmons, for the defendant.

D. U. Johnson, for the plaintiff.

Merrick, J. The controversy between the parties at the trial of this action related entirely to the amount of money which the plaintiff had earned in the performance of his contract. He had built the cellar wall as he had agreed to do, and was entitled to receive therefor at the rate of eleven cents a foot, in full compensation for his services. The jury had therefore only to determine the number of feet of which the wall consisted, in order to ascertain the sum to which the plaintiff was entitled, and for which they were to render a verdict. But how was this to be done and in what manner was the admeasurement to be made? The meaning of the language used by the parties in their agreement being, in reference to the compensation to be

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paid for the work which was to be done, equivocal and obscure, it was certainly competent for the plaintiff to introduce proof of usage, in order to interpret the meaning of the language and to ascertain the extent of the contract. 1 Greenl. Ev. § 292. "The true office of usages of trade," says Mr. Greenleaf, "is to interpret the otherwise indeterminate intention of the parties;" "and to fix and explain the meaning of words and expressions of doubtful or various senses." 2 Greenl. Ev. § 251.

The evidence in relation to a general usage to make an allowance to the extent claimed by the plaintiff in the admeasurement of octagon walls beyond the mere inner surface of them, on account of necessary additional work at the angles, appears to have been put in without objection. And it was, we think, very properly admitted. But one of the witnesses, who was called to prove this general usage, testified also as to the mode in which he thought rectangular and octagon walls should both be alike measured. The defendant objected to the testimony relative to the rectangular wall, because the two were so dissimilar that they could not be compared with each other. We do not see any force in this objection. The angles in the two kinds of wall differ it is true in some degree, but they are not wholly unlike. And proof of the correct mode of measuring the former to ascertain the number of feet of which it consists, would afford some light and some aid in determining how, for a similar purpose and under a similar contract, the latter ought to be admeasured. It was for the jury to say what weight ought justly to be allowed to it.

The instructions to the jury were right. They were to determine upon the evidence in the first instance whether there was sufficient proof of such a general usage as was contended for by the plaintiff. If they found it to exist, they were properly advised to take it as a guide in fixing upon the mode of measuring the wall; the computation according to which was to be adopted as the basis of their verdict. If there was no such general usage proved, then undoubtedly it was their duty, as they were further advised, to allow for such an admeasurement of the wall as they were satisfied upon all the evidence in the case

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was just and proper. This would be acting upon the most reasonable construction which could be given to the agreement between the parties; and since the language in which it was expressed was not precise and definite, but in some degree obscure or of doubtful meaning, a decision upon the conflicting pretensions of the parties upon any other interpretation would have been justly obnoxious to complaint.

As all these instructions, as well as that in relation to interest, appear to us to have been correct, the

Exceptions are overruled.

CYRUS GURNEY *vs.* ELIZABETH HOWE, Administratrix.

A record, kept as required by the regulations of the post-office department under the U. S. St. of 1855, c. 173, of registered letters received at a post-office, is admissible in evidence, without the testimony of the clerk who actually kept it.

A mistake in the date of the receipt of a letter, as stated in a record of registered letters kept according to the U. S. St. of 1855, c. 173. and produced by the postmaster, is not conclusive, but may be controlled by his testimony of the ordinary course of the mails.

A letter containing money sent by a debtor to his creditor through the post-office is at the risk of the debtor, unless that mode of remittance is authorized by the creditor, either by express direction or by the usual course of dealing between the parties.

ACTION OF CONTRACT on a promissory note made by Edward C. Howe, the defendant's intestate, to Cyrus G. Gurney, and indorsed by him to the plaintiff. Answer, payment to Cyrus G Gurney.

At the trial in the court of common pleas, before *Sanger*, J., it appeared that Edward C. Howe on the 19th of June 1855 deposited in the post-office at South Abington a letter, containing in bank bills the amount then due on the note, and directed to Cyrus G. Gurney at Taunton, and on which three cents were prepaid by stamp, and three cents by cash; and there was evidence tending to show that the letter was forwarded in due course of mail by the postmaster at South Abington to Taunton, together with a letter bill on which he entered "1 letter with postage, 3 cents cash, 3 cents stamp."

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The postmaster at Taunton, being called as a witness by the defendant, testified that in due course of mail the letter should have been received at his office on the evening of June 20th; and that he had no recollection of the receipt of any particular letters at that time. But he produced what purported to be a record of letters received at his office at and about that time, which, he testified, was required by the law of the United States to be made and kept in his office*; but that it was not made by him, but was kept by his clerk, who was not present; that he had compared the record with the letter bill, of which it was a transcript, and which he had since forwarded to Washington, as required by law. The judge, against the plaintiff's objection, permitted the record to be read and shown to the jury.

The record was divided into columns, the first of which showed the date when, and the second the places whence, the letters were received. At the top of the page in question was entered June 21st, which was the only date upon this page; and in the second column were the names of South Abington and other towns in Massachusetts, followed by "New York;" and the date of the preceding page was June 20th. The postmaster, against the plaintiff's objection, was permitted to testify that the entry upon the record of the date of receiving this letter was incorrect; that the contents of the mails were entered in these columns in order as the mails arrived; that, from his knowledge of the course of the mails and their time of arrival, the New York mail was the first on the morning of June 21st,

* By the U. S. St. of 1855, c. 173, § 3, the postmaster general of the United States is "authorized to establish a uniform plan for the registration of valuable letters on application of parties posting the same." 10 U. S. Sts. at Large, 642.

The regulations of the post-office department, c. 36, contain provisions for the registration of such letters at the office of mailing, giving receipts therefor to the person depositing them; for the mode of keeping accounts thereof, and of transmitting such letters and the letter bills thereof; and that on their receipt at the distributing office the clerk who opens and distributes the mail shall compare them with the bill, and "pass it, with the letters, to the clerk who keeps the account of registered letters received for distribution, who will enter its contents in his account."

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and the mail from South Abington must have arrived on the evening of June 20th, and the entry of the date of June 21st, although correct for the New York mail and what followed it, was not correct for what preceded it, including South Abington; that the date at the top of this page should have been "June 20th," and that "June 21st" should have been entered in the first column, opposite the words "New York" in the second.

Cyrus G. Gurney, being called by the plaintiff, testified that about the 9th of June he demanded payment of the note, and "that the deceased said that he would send the money to him by mail to Taunton, either the next week or the week after; and the witness replied to him that he would send the note as soon as he received the money." The witness, as the bill of exceptions added, "also testified to some conversation between the deceased and himself as to his (Gurney's) post-office address, and the course, regularity and safety of the mails between South Abington and Taunton. He further testified that he called at the post-office at Taunton and inquired for letters, every night, from the 11th day of said June until the 23d inclusive, but never received any letter from the deceased or any money. This was all the evidence offered as to any agreement as to how the money was to be sent, or at whose risk, or how the note should be surrendered."

The plaintiff requested the court to instruct the jury, "that unless Cyrus G. Gurney either intended or consented to be held responsible for the safe transmission of the money by mail, the risk was on the defendant's intestate." But the judge instructed the jury "that if the proposition to send by mail came from the defendant's intestate, and was merely assented to tacitly or otherwise by Cyrus G. Gurney, it would be sent at the risk of the deceased; but if the proposition came from Gurney, and was assented to by the deceased, and the deceased in due time deposited the letter properly sealed and directed, and postage prepaid, containing the money, in the South Abington post-office, the money would be at the risk of Gurney, and from that time, if the money was sent by mail in pursuance of a mutual

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understanding and agreement that it should be so sent, had between the deceased and Gurney, and after they had consulted together and determined upon the mode of its transmission, then the money, after being deposited in a letter as above in the South Abington post-office, would be at the risk of Gurney." The verdict was for the defendant, and the plaintiff alleged exceptions.

B. W. Harris, for the plaintiff.

B. Sanford, for the defendant, to the point that the instructions were sufficiently favorable to the plaintiff, cited 2 Parsons on Con. 152, and cases cited in note.

Bigelow, J. 1. The register of letters, received at the post-office at Taunton, being an official record authorized by law to be kept, was admissible in evidence. 1 Greenl. Ev. § 484.

2. The evidence of the postmaster as to the error upon the register in the date of the receipt of the letter was rightly received. The register was not conclusive as to this date. A party has always the right to prove that a fact is different from that which it would appear to be by a portion of his own evidence. If this were not so, he would be bound by the innocent mistakes of witnesses and third parties. He can be allowed to prove the exact truth, without impeaching the evidence offered by himself. The evidence in this case was not offered to contradict the register, but to show the regular and due course of the mail, which was clearly competent. Incidentally it also showed that a date in the register was probably erroneous. Besides, the exact date of the receipt of the letter in question was quite immaterial. The real and material inquiry was whether it was received at all.

3. The instructions given to the jury were not adapted to the case, and did not properly meet the request made by the plaintiff's counsel for a different ruling. The general rule of law is that the duty lies on the debtor to pay his debt to his creditor personally or to his authorized agent. The burden of proof to show a payment of a debt is not sustained therefore by proof that a letter, containing the requisite amount, directed to the creditor, was duly deposited in the post-office. The debtor must

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go further. He must also show that the creditor authorized this mode of remittance, either by express assent or direction, or a usage and course of dealing from which such assent or direction may be fairly inferred. If this can be shown, then the transmission is at the risk of the creditor; otherwise, it lies upon the debtor. *Warwicke* v. *Noakes*, Peake, 67, 186. *Walter* v. *Haynes* Ry. & Mood. 149. 2 Greenl. Ev. § 525. *Wakefield* v. *Lithgow*, 3 Mass. 249. The instructions given to the jury on this point did not state the rule of law with distinctness and accuracy. They seem to make the case depend on the question whether the proposition to transmit by mail came from the plaintiff or from the defendant's intestate. That was a fact wholly immaterial. The real question was, whether the plaintiff authorized a remittance by mail, without qualification; or whether such authority was accompanied with any condition as to the risk of such transmission. As this question does not seem to have been passed on by the jury, the case must be tried anew.

Exceptions sustained.

HIRAM RANDALL *vs.* HULDAH DOANE.

The admission, to contradict evidence of the adverse party, of testimony which appears to relate to the same transaction, but is afterwards proved by other evidence to be a different one, is no ground of exception, without shewing that the jury were not instructed to disregard it.

In an action by R. against D. for the keeping of a horse, which was defended on the ground that T. was R.'s debtor, the judge instructed the jury that if R.'s servant, with whom the horse was originally left, "understood that the horse was there for T., as T.'s horse and at his charge, and that T. was to pay for the keeping, R. could not recover;" and declined to instruct them that "if D. by himself or his agent left the horse at R.'s stable, R. could recover, unless D. notified him to look to T. for pay, and R. agreed to look to T. for pay." *Held*, that R. had no ground of exception.

ACTION OF CONTRACT for the keeping of a horse. At the trial in the court of common pleas before *Sanger*, J., it appeared that the horse was brought to the plaintiff's stable in his absence,

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and left with his hostler; and there was conflicting evidence whether the hostler was told that the horse was the defendant's or that it was George W. Turner's.

The plaintiff called Turner as a witness, who testified that he had several conversations with the defendant in regard to the horse, and that the last conversation, which led to the horse's being sent to the plaintiff's stable, was at the defendant's house in South Braintree, and was, in substance, "that he told the defendant that he would have a better chance, and would do his best to sell the horse if it was kept nearer to him; that the defendant asked him if there was any place there where he could get the horse kept, and he said she could at Randall's, and she gave him to understand that she should send the horse there, if she did not sell him shortly."

The defendant called Sabrina Willis, who testified, the plaintiff objecting, that she was present at the above conversation between Turner and the defendant, and that the conversation was, in substance, that Turner asked where the horse was, and was told; that he then said he had no horse of his own, and should like to have this horse; that he would take and keep it free of any expense to the defendant, and that he would use the horse enough to pay for its keeping, and would do his best to sell it.

The defendant testified that the last conversation with Turner previously to the horse's going to the plaintiff's stable, was not at South Braintree, as Turner testified, but was at North Abington, where she and one Higgins went to see Turner; and she and Higgins both testified, the plaintiff objecting, as to the conversation at North Abington, and that it was in substance "that Turner asked to have the horse for his work, and that if she permitted him to have the horse, it should cost her nothing for his keeping; that Turner wished the horse sent to him; that he expected to be absent for a day or two, and that if the horse came in his absence, he would leave some one to take charge of him."

The several witnesses for the defendant testified that at this time they did not know of the existence of such a man as the

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plaintiff, nor did they know of him till a long time after, when Turner had become insolvent.

The judge instructed the jury, "that the burden of proof was on the plaintiff, to satisfy them that the keeping of the horse was rightly chargeable to the defendant; that if the defendant herself brought the horse to the plaintiff's stable and left it there to be kept, whether she knew that the plaintiff was the particular person keeping the stable or not, she would be liable therefor that if the horse was taken to the plaintiff's stable and left there to be kept by an agent of the defendant authorized so to do, the defendant would be liable therefor; that if the horse was taken to the plaintiff's stable by a servant of the defendant, who at the time had the horse in charge, but had no authority to take or leave the horse at the plaintiff's stable, to be there kept at the defendant's expense, and was left there by the servant, if the defendant knew that the horse was there, and so kept and permitted the horse to remain there, she would be liable; but if at the time the horse was taken to the plaintiff's stable, the plaintiff's servant understood that the horse was there for Turner, as Turner's horse and at his charge, and that Turner was to pay for the keeping, the defendant would not be liable therefor."

After the judge had finished the instructions to the jury, the plaintiff asked him to instruct the jury, that "if the defendant, by herself or agent, left the horse at the plaintiff's stable, unless the defendant notified the plaintiff to look to Turner for pay and the plaintiff agreed to look to Turner for pay, they must find for the plaintiff; and the burden is on the defendant to prove this notification." But the judge declined to give any further instructions to the jury. The jury found for the defendant, and the plaintiff alleged exceptions.

P. Simmons, for the plaintiff.

E. Ames, for the defendant.

By the Court. The testimony of Willis, offered to contradict Turner, was competent at the time it was admitted. As the case then stood, the plaintiff relied on the testimony of Turner to establish his claim. If the defendant's testimony subsequently showed that the conversation to which Willis

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testified was not the same to which Turner's evidence related, or otherwise showed it to be immaterial, it was for the court to instruct the jury not to regard it. *Wilder* v. *Holden*, 24 Pick. 12. As it does not appear that such instructions were not given, the plaintiff fails to show that he was aggrieved by the rulings of the court.

The instructions bearing on the merits of the case seem to have been correct, and adapted to the facts in proof.

Exceptions overruled.

FRANCIS J. GODDARD *vs.* JOHN PERKINS & another.

An action of trespass, in which the defendant justifies under a claim of right, exercised without unnecessary force, cannot be transmitted to this court upon exceptions to a *pro forma* ruling of the court of common pleas that "not considering the question of damages, the plaintiff could not maintain his action," without disposing of the question whether unnecessary force was used.

ACTION OF TORT for breaking and entering the dwelling-house, connected with the jail in Plymouth, occupied by the plaintiff, as deputy jailer under appointment by the county commissioners. Answer, that the defendant Perkins was sheriff of Plymouth County, and entitled as such to the custody and control of all the county buildings and property, and that the entry of the defendants was without unnecessary force, and to enable Perkins to execute with fidelity his official duty.

Trial in the court of common pleas before *Sanger*, J., who signed a bill of exceptions, which stated that, after the first witness for the plaintiff had been partly examined, "the court suggested that the counsel for the plaintiff should confine himself to such facts as were necessary to maintain the case, independent of damages." The bill of exceptions recited all the evidence, and concluded as follows: "Upon this evidence, the presiding judge ruled *pro forma*, that, not considering the question of damages, the plaintiff could not maintain his action,

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and thereupon a *pro forma* verdict was taken for the defendants; to which ruling the plaintiff excepts."

E. Wilkinson & B. Sanford, for the plaintiff.

J. M. Keith & S. J. Gordon, for the defendants.

Shaw, C. J. As the case now stands, if we overrule the exceptions, we can only affirm the judgment on the verdict; otherwise we should decide a mere abstract question, leaving at least one of the issues in the cause, namely, whether excessive force was used, wholly undetermined and to be settled by another trial. Parties should bear in mind that, under our present system, a judgment of the court of common pleas is a final judgment, subject only to be set aside, on exceptions or appeal, for erroneous rulings in matter of law. Rev. Sts. *c.* 82, §§ 12–15. *St.* 1840, *c.* 87, §§ 4, 5.

This ruling is said in the exceptions to have been "*pro forma.*" But the parties were entitled to the judge's opinion, to his best judgment, on every question of law arising in the course of the trial. The case stands very differently from a case in this court, which a judge may, in his discretion, or on the motion of either party, reserve for the opinion of the whole court, and break off the trial for that purpose. Rev. Sts. *c.* 81, §§ 26, 27. The ruling of the judge of the court of common pleas, as stated at the close of the bill of exceptions, was entirely irregular, and as the plaintiff is unwilling to let his whole case depend upon the main question of right, the entry must be

Exceptions vacated; case remitted to the court of common pleas, with directions to set aside the verdict, and grant a new trial upon the whole matter in issue.

Note. By *St.* 1859, *c.* 196, § 32, the superior court is authorized, after verdict, to report a case for determination by this court.

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Isaac Wright *vs.* Old Colony and Fall River Railroad Company.

In an action against a corporation on a debt, the defence was payment; and it appeared that the president of the corporation took the bill receipted from the creditor to get the money from their treasurer, and gave the bill to the treasurer, who made a correction in it, and handed it with the money back to the president, who lost them. The defendants contended that their president acted as the creditor's agent; and asked that the jury be instructed "that the circumstance that the treasurer, after correcting and paying the bill, lost the receipt, to be returned after showing the same, did not prevent the antecedent acts from constituting a legal payment." But the judge, without thus instructing the jury, instructed them as to the respective duties of a president and treasurer of a corporation, and that it was for the jury to say, not upon any particular portion of the proof, but upon all the evidence, for whom the president was acting. *Held*, that the defendants had no ground of exception.

Action of contract for wood sold and delivered. Answer, payment. At the trial in the court of common pleas, before *Sanger*, J., it appeared that the plaintiff had supplied the wood to the defendants, and been paid therefor by the Old Colony Bank, and had authorized the bank to collect the amount at the expense of the bank from the defendants.

It was in evidence that Loud, the president of the bank, called at the office of the defendants' treasurer in Boston, and not finding him went to Alexander Holmes, the defendants' president, and Holmes, after a conversation with Loud, took the bill to get the money from the treasurer; and on the same day handed it to the treasurer, who, discovering an error of one dollar in the footing of the bill, corrected it, handed to Holmes the money due on the bill, and with it the bill itself, that the mistake might be seen and the bill subsequently returned to the treasurer; that Holmes put the money in his pocket book, and soon left Boston in the defendants' cars, and on the train, some distance from Boston, was asked by Loud for the money, and thereupon discovered that it and his pocket book were missing, having probably been stolen from him at the station in Boston.

From the evidence the plaintiff contended that Holmes, in what he did in regard to the wood bill, acted as the agent of the defendants, and that the money not having reached Loud, but

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being lost by the agent of the defendants, the loss fell on the defendants. The defendants contended that Holmes was acting in regard to it only as the agent of Loud, doing him a kindness; and that when the treasurer paid Holmes the money, it was a payment to Loud, and that therefore the loss should fall on him.

The defendants requested the court to instruct the jury, "that the circumstance that the treasurer, after correcting the bill (according to the minutes thereon) and paying the bill, lent the receipt, to be returned after showing the same, did not prevent the antecedent acts from constituting a legal payment."

The court did not in terms so instruct the jury; but instructed them "that the duties of the president and treasurer of the defendants were distinct and different (the court stating generally what the duties of each officer were under the law and upon the evidence); that the fact that Holmes was the president of the defendants would not make him the agent of the treasurer and of the corporation in this matter, nor would it prevent him from so acting; that the treasurer's place of business, and the proper place ordinarily for him to pay the debts and demands due from the corporation, was his office; but that he might well, if it were necessary, employ one of his clerks, or any suitable person, to make a payment in his behalf, and in behalf of the corporation, as, for instance, he could by such person send money of the corporation to take up a note of the corporation due at a bank; and so he could transmit the money by Holmes to pay this wood bill, if he pleased, and it was for the jury to say, not upon any particular portion of the proof, but upon all the evidence upon this point, how Holmes in this matter was acting, whether for the treasurer and the corporation, or for Loud." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

E. Ames & C. G. Davis, for the defendants.

E. Wilkinson, for the plaintiff.

Merrick, J. This action is brought for the benefit of the Old Colony Bank, in whose behalf their president, Loud, acted as an authorized agent in the several transactions out of which

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the controversy between the parties to the present suit arose. The defendants set up in their answer, and at the trial relied as their sole defence upon an alleged payment of the plaintiff's bill. It appeared in evidence that their treasurer, by whom the payment of the bill should properly have been made, did upon the presentment of it to him by Holmes, their president, duly receipted, deliver to him the full amount of it in money, for the purpose of paying it. But whether the delivery of that money to him operated as, and was in fact a payment of the debt due to the Old Colony Bank as the equitable assignee of the plaintiff, depended upon the determination of the further question in relation to the party on whose account he received it, and for whom he was authorized to act. It was conceded that if he was empowered by Loud to receive it on his account, and acted as his agent in taking it from the defendants' treasurer, the debt was paid, and the action could not be maintained; but this was denied by the plaintiff, who insisted that Holmes was the agent or servant or messenger of the treasurer or of the defendants, taking the money from him to carry and pay the same to Loud in discharge of their admitted indebtedness. This was the precise point in issue between the parties. They did not disagree as to the legal consequences which would follow from establishing the fact of his agency, but their dispute was confined to the question whether he was the agent of Loud or of the defendants. In this aspect of the case, the jury were instructed that it was for them to say, not upon any particular portion of the proof, but upon all the evidence on this point, how Holmes in this matter was acting, whether for the treasurer and the corporation or for Loud.

The defendants do not contend, in support of their exceptions, that this instruction was erroneous, but they complain that it was too general and indefinite; and that they were entitled to have had the jury advised as to the application of the law, in relation to the facts proved and the issue to be determined, in a manner more pointed, direct and explicit. It is certainly true that in many cases the mere statement of abstract legal propositions, however correct, will afford a very inadequate guide to the

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jury in the solution of complicated questions; and courts exercising a supervisory power over judicial trials will interpose for the sake of protecting the rights of parties and the due administration of justice, whenever it is seen that for want of a definite rule and an exposition of the law suitable and adapted to the particular occasion upon which it is given, the jury may have failed to perform or have been misled in the discharge of their duty. *Wood* v. *O'Kelley*, 8 Cush. 408. *Kellogg* v. *Northampton*, 4 Gray, 68. But no such difficulty appears to us to have arisen in the present case. It was the duty of the jury to determine a pure, simple question of fact. Both parties concurred in asserting that that was the point to be determined; and there was no difference between them as to the legal effect which was to follow from the proof and establishment of the one or the other proposition. It was quite sufficient therefore for the court to direct the attention of the jury to the only matter for their consideration, which was in controversy between the parties, and to advise them that it ought not to be determined upon an imperfect or partial, but upon a comprehensive, view of the whole evidence laid before them. And this instruction, together with an exposition of the respective duties and obligations of the president and treasurer of the defendant corporation, particularly in reference to the evidence as to what occurred between them respecting the payment of the plaintiff's bill, which does not appear to have been in any degree objectionable or unsatisfactory, must be considered to have been a substantial adoption of the ruling which was sought for from the court respecting the effect of the mere loan of the receipt for a special purpose, after the debt had been previously paid.

These instructions being found to have been correct, and none of the other objections taken at the trial having been insisted upon or adverted to by the defendants' counsel at the argument, we have presumed that they were intentionally waived.

Exceptions overruled.

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Sarah A. Clark *vs.* Ellis Packard, Executor.

A testator devised to his daughter H. one third part of a certain farm, "but if my executor shall think best to sell said farm, then I give to her one third part of the proceeds of the sale of said farm;" to his daughter S. one third part of the same farm, "or if said farm is sold, then one third part of the proceeds of the sale of said farm;" and after a devise to his daughter A. in the same words as to S., added, "And I hereby authorise my executor to sell and pass deeds to convey said farm in such manner as he may think best for all concerned; and divide the proceeds as above directed; but if he should think best not to sell the same, then they may take the farm." After the making of his will, the testator in his lifetime sold the farm. *Held*, that S. was entitled to one third of the proceeds of such sale.

Action of contract under the will of Micah Packard, the plaintiff's father, which contained these clauses:

"I give to my daughter Harriet one third part of the farm which was conveyed to me by Jesse Perkins as administrator of the estate of Daniel Field, deceased. But if my executor shall think best to sell said farm, then I give to her one third part of the proceeds of the sale of said farm,

"I give and bequeath to my daughter Sarah Ann Clark, wife of George Clark, to her sole and separate use, free from the interference or control of her husband, and to her heirs and assigns, one third part of the farm which was conveyed to me by Jesse Perkins as administrator of the estate of Daniel Field, deceased; or if said farm is sold, then one third part of the proceeds of the sale of said farm.

"I give and bequeath to my daughter Adaline Packard, wife of Charles J. F. Packard, to her sole and separate use, free from the interference or control of her husband, and to her heirs and assigns, one third part of the farm which was conveyed to me by Jesse Perkins as administrator of the estate of Daniel Field, deceased; or if said farm is sold, then one third part of the proceeds of the sale of said farm.

"And I hereby authorize my executor to sell and pass deeds to convey said Field farm in such manner as he may think best for all concerned; and divide the proceeds as above directed; but if he should think best not to sell the same, then they may take the farm."

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After making his will, the testator sold the Field farm, and then died. This action was brought by his daughter Sarah Ann Clark, mentioned in the will, to recover one third part of the price obtained on such sale, and was submitted to the decision of the court upon the facts above stated.

J. White, for the plaintiff.

A. L. Cushing & W. P. Field, for the defendant. 1. The intent is to be gathered from the whole will, and one clause is to be interpreted by considering it with all the others. *Richardson* v. *Noyes*, 2 Mass. 56. *Foote, appellant*, 22 Pick. 302. *Brimmer* v. *Sohier*, 1 Cush. 118. *Malcolm* v. *Malcolm*, 3 Cush. 477. *Morton* v. *Barrett*, 22 Maine, 265.

2. From the devise to his daughter Harriet preceding, and the direction to executors following, the clause in question, it is plain that no other sale than that by executors was intended, and the necessary words may be supplied. *Doe* v. *Micklem*, 6 East, 486. *Ray* v. *Enslin*, 2 Mass. 554. *Bowers* v. *Porter*, 4 Pick. 208.

3. The devise being specific, the testator by subsequently conveying away the estate revoked the will *pro tanto*. *Goodtitle* v. *Otway*, 7 T. R. 399. *Newbold* v. *Roadknight*, Taml. 492. *White* v. *Winchester*, 6 Pick. 48. *Hawes* v. *Humphrey*, 9 Pick. 350. *Brown* v. *Thorndike*, 15 Pick. 388. 1 Jarman on Wills, 147.

Merrick, J. The defendant's testator, in and by his last will, gave and bequeathed to the plaintiff, and to her heirs and assigns, one third part of the farm which had been conveyed to him by the administrator of the estate of Daniel Field, or, if the farm should be sold, one third of the proceeds of its sale. This then was a devise in fee of one third of the farm, or a bequest of a certain sum of money, to be ascertained by computation, dependent upon the contingency of the sale of the farm. He did sell it in his lifetime, and received the consideration for which it was sold. Instead therefore of taking any part of the real estate by devise, the plaintiff became entitled to receive as a legatee, after the will had been duly proved and allowed, the proportionate share of the proceeds of its sale, which had been bequeathed to her instead of it.

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This is the obvious and natural meaning of the words which are used by the testator in the clause of his will in which he makes provision for the plaintiff. And there is nothing in any other part of the will, tending to show that a different interpretation ought to be given to it, or that the testator intended anything different from this upon the occurrence of any contingency. If there had been no provision beyond the mere devise of the real estate, no doubt the sale of it would have operated as an ademption; and if the legacy had been bequeathed upon a contingency which could never occur, the legatee could not have recovered it, and it must have been lost. Thus in a prior clause of the will he devised one third part of the same farm to his daughter Harriet; but if his executor should think proper to sell the farm, then and in that case he bequeathed to her one third of the proceeds of the sale. But as the farm was disposed of by the testator himself in his lifetime, both the devise and the legacy necessarily failed; the devise, because there was nothing at the testator's decease upon which it could take effect, and the legacy because the contingency of a sale by the executor had become impossible. But these two clauses of the will are entirely distinct and separate; and the circumstance that one of the daughters, whether through accident, mistake or design, derives no advantage from the provisions contained in one of these clauses, affords no reason why another should not avail herself of the benefit of a legacy which is bequeathed to her in words apt, significant and sufficient to bestow it.

The part of the will, which confers on the executor authority to sell and pass deeds to convey the Field farm in such manner as he may think best for all concerned, has been referred to by the counsel for the defendant, as having a tendency to show that this was the only contingency contemplated by the testator, upon which it was his purpose to bequeath to each of his daughters one third part of the proceeds of the sale of the farm, as a substitute for and in the place of a devise to her of a share in the farm itself. It is possible, and perhaps probable, that this was so; that he did not then anticipate that he should himself ever make sale of the estate. But if this be true, it only

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shows his fixed purpose to make a certain provision for them either by a devise of the land or a bequest of an equivalent. And this purpose, plainly manifested in the will, is not to be defeated by mere operation of law, in consequence of any subsequent act or occurrence which is not so at variance with its provisions in relation to that purpose as necessarily to operate to that extent an ademption of it. So far from the sale of the farm by the testator being inconsistent with the bequest of a portion of the proceeds of its sale to Sarah, the sale, without any restriction or qualification of the time when, or the person by whom, it shall be made, is specified as the event upon the occurrence of which the legacy of money is to be substituted for a devise of the land. The defendant is therefore, upon the facts agreed, to be defaulted, and the plaintiff is entitled to judgment for the amount of the legacy, with interest from the time of demand upon the executor for its payment.

Judgment for the plaintiff.

INHABITANTS OF SOUTH SCITUATE *vs.* INHABITANTS OF HANOVER.

A town which voluntarily pays the fees of commissioners appointed by the legislature to establish the boundary line between it and another town, under a resolve of the legislature providing that such fees shall be paid by the towns, one half by each, cannot recover from the other town any part of the sum paid.

ACTION OF CONTRACT to recover half the fees paid by the plaintiffs to the commissioners appointed by the governor to establish the boundary line between South Scituate and Hanover, under the resolve of 1856, *c.* 79, which provided "that the said towns of South Scituate and Hanover shall be required to defray the expenses of said commission, each of said towns paying one half of said expenses." The plaintiffs had paid the whole fees, without being requested by the defendants so to do.

S. J. Gordon, for the plaintiffs.

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P. Simmons, for the defendants.

BIGELOW, J. There is nothing in the facts of this case from which a promise by the defendants, either express or implied, can be inferred to pay the plaintiffs the money sought to be recovered in this action. It is true that the defendants were legally liable, under the resolve of the legislature of May 31st 1856, to pay one half of the expenses of the commission appointed to establish the boundary line between the towns of South Scituate and Hanover. But this was a liability either to the commissioners or to the Commonwealth, and not to the plaintiffs. There is no provision in the resolve, authorizing or requiring the plaintiffs to pay the whole expenses, and rendering the defendants liable for one half thereof to the plaintiffs. It was a voluntary payment by the plaintiffs of a debt due from the defendants. Such payment gives no cause of action. It falls within the well settled rule of law, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and no action will lie by reason of such payment, unless a request, either express or implied, to make the payment is proved. The law does not permit the liability of a party for a debt to one person to be shifted so as to make him debtor to another without his consent. *Winsor* v. *Savage*, 9 Met. 348.

Judgment for the defendants.

WINTHROP S. BAKER & another *vs.* JACOB W. CROSBY.

A right of way of necessity ceases by acquiring another right of way over the land of its owner to the same highway, and is not revived by conveying away that land.

Evidence that for more than twenty years there has been a well defined travelled way with ruts visible in some parts, though not so worn by travel as to prevent the growth of grass, leading from the gate of a house lot across a meeting-house green to the highway, with no other ready and convenient access to the house, is sufficient evidence of a way by prescription to be submitted to a jury.

ACTION OF TORT for breaking and entering the plaintiff's close in North Bridgewater, and with horses and carriages passing

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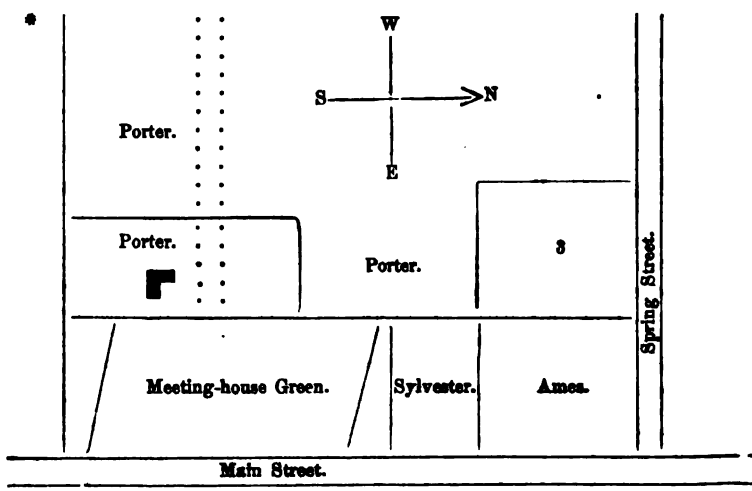
over the same. Answer, a right of way over said land from the main street to lands of the defendant.

At the trial in the court of common pleas before *Bishop*, J., the plaintiffs introduced evidence tending to show possession by the First Parish in North Bridgewater of the Meeting-house Green, so called; a lease from that parish to the plaintiffs of the southernmost half of that green; and the trespasses complained of on the part so leased; and then rested their case.

The defendant introduced evidence tending to show that all the defendant's acts were done in the rightful use and enjoyment of the right of way claimed in his answer; and, in proof of such right of way, gave in evidence a deed, dated January 13th 1745, from Lydia Packard to John Porter of the lands marked "Porter" on the plan in the margin,* "with all the appurtenances thereof;" an instrument in writing from Porter to Packard of the same date, purporting to bind him and his heirs "to allow of a drift way through the southerly end of my land on which my house stands forever, and maintain the gates at the end;" deeds from Mary Ames in 1756, and from Israel Sylvester in 1759, to Porter, of the lots respectively marked "Ames" and "Sylvester" on the plan; and deeds in 1792,



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from Porter, of the "Sylvester" and the southerly part of the "Ames" lot to John Crafts, and the residue of the "Ames" lot to Thomas Crafts, both of whom conveyed them away in Porter's lifetime.

The defendant also offered evidence that Porter died intestate in 1802, in occupation of the land conveyed to him by Lydia Packard, and also of the lot marked "3" upon the plan; and his heirs conveyed their title in all said lands to John Crafts, who died in 1849, and by his will devised the southeasterly lot on which the house stood (as shown on the plan) to the defendant's minor daughter, and the residue to the defendant's wife and another whose rights she had since acquired.

It appeared that Main Street was an ancient way, formerly known as the Old Bay Path; that Spring Street, as shown on the plan, was laid out about thirty years ago; that in 1851 a highway called Pleasant Street was laid out from Main Street by the northern boundary of the Meeting-house Green, and over the southwesterly corner of the Sylvester lot, and thence in a northwestwardly direction, across the "Porter" land and the southwesterly corner of lot "3," to Spring Street; and that the defendant in 1852 laid out a private way from the Meeting-house Green westwardly, and to the north of the "Porter" house, according to the dotted lines on the plan, and leading to the lands described in his answer.

The defendant also introduced evidence that the "Porter" House was an ancient house, having upon a tile in the chimney "1743" or "1745;" that the outbuildings were apparently as old as the house; and there were ancient gates and bars opening from the house lot into the Meeting-house Green, which were there in Porter's life, and had since been kept and maintained by Crafts. There was also evidence that from beyond the memory of man the green was fenced on all sides except towards the east, and on that side remained open until 1855.

There was also evidence tending to show that Porter, and after him Crafts until 1849, lived in the "Porter" House, and occupied the Porter Farm, and, together with their families, servants

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and all persons having communication with them, at all times as occasion required, passed and repassed through the largest of said gates over the green to Main Street, in a well defined travelled way, with ruts in some parts, more or less visible during the whole year, and particularly visible in the spring, but not so much worn by travel as to prevent the growth of grass; that they also passed through the different gates and bars into the green, for the purpose of going to and from their barn and yard, of driving cattle to and from pasture, and of cultivating the southern part of their land; and also that the green had always been used as a training field and playground, so far as its surface permitted, and all persons who chose passed over it in such directions as they pleased.

The defendant also introduced evidence tending to show that the land south of the way laid out by the defendant, and of the right of way claimed by him across the plaintiff's lot, was impassable with carriages; that the lands conveyed by Sylvester and Ames to Porter were at the time of such conveyances so rocky and uneven as to be very inconvenient to travel over with teams or carriages without removing the stones and levelling the surface of the ground; and that to pass over those lands would be a circuitous and longer route than by the way claimed by the defendant.

Bishop, J. instructed the jury that the evidence did not justify the defendant's entry upon the plaintiffs' close; a verdict was taken for the plaintiffs, and the defendant alleged exceptions.

A. L. Cushing & W. P. Field, for the defendant.

J. J. Clarke & J. White, for the plaintiffs.

By the Court. There is no evidence of a right of way by grant or necessity; for it does not appear that Lydia Packard ever owned the Meeting-house Green; and if Porter ever had a way of necessity over it, he subsequently acquired other land, bounding on the land granted to him by Packard, and on a public way, which removed the necessity. *Nichols* v. *Luce*, 24 Pick. 102. *Holmes* v. *Goring*, 2 Bing. 76, and 9 Moore, 166. Woolrych on Ways, 71.

But there was evidence tending to show a way of prescrip-

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tion. Such were the facts, that there was no other ready or convenient access; that the house stood there at the time of the deed to Porter in 1745, and its occupants had since used the way claimed; that there were gates opening into the green, and a regular track from the principal gate to the main street, indicating a peculiar and exclusive use. This evidence should have been submitted to the jury. *Exceptions sustained.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF NORFOLK, OCTOBER TERM 1857, AT DEDHAM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. BENJAMIN F. THOMAS,
HON. PLINY MERRICK,
} JUSTICES.

JOHN J. CLARKE, Executor, *vs.* JOSEPH W. HAYES.

Land devised in trust to pay the income, during the life of the testator's sons, to them and the heirs of those who should die first, and, on the survivor's decease, to convey the land to their heirs, may under authority of the legislature be sold, upon giving security to invest the proceeds upon the same trust.

BILL IN EQUITY by the surviving executor of the will of Thomas Cordis for the specific performance of an agreement for the purchase of real estate, which the plaintiff had been authorized by a resolve of the legislature of 1857, *c.* 60, (first giving bond, as he had since done, to the satisfaction of the judge of probate of the county where the will was proved, for the faithful execution of the power so conferred,) to sell and convey in fee simple, "free and discharged from all trusts and claims arising

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under or by virtue of the will aforesaid, and from all liability for the application of the purchase money;" "and to invest and hold the net proceeds of such sale or sales during the lives of the four sons of the said testator, in the same manner as is provided for in said will, and for the use and benefit of the same persons as the said property itself, if it had not been sold, would have been holden under the provisions of said will; and to pay over the income received on said proceeds to the persons who would have been entitled to the income and rents and profits of such real estate, had there been no such sale or proceedings as are hereby authorized."

This land was devised by Cordis to his executors in trust to take the rents and profits thereof during the life of the testator's four sons and the longest liver of them, "and therewith make all necessary repairs and improvements, and pay all taxes, insurance and other necessary charges and expenses in and about the same; and, after all payments deducted, then as soon as received, and as often, to pay over the residue of such rents and profits to my said four sons, during their joint and several lives, in equal proportions, to and for their respective, sole and separate use and benefit forever; and after the decease of one or more of my said sons, so long as either of them shall live, then to pay over the proportion that such deceased son or sons would have been entitled to receive of such rents and profits, had he or they been living, to the legal heirs of such deceased son or sons;" and "after the death of all my said four sons, to convey, assign, transfer and set over said real estate to said heirs of my said four sons respectively, in the proportions above named, by right of representation, to have and to hold the same to them respectively, and to their respective heirs, executors, administrators and assigns, to their sole use and behoof forever."

The bill set out the material clauses of the will, and the resolve of the legislature; and alleged that a large portion of the land so devised was unimproved, and did not produce sufficient rent to meet the taxes and other expenses incident thereto, and that the plaintiff was consequently obliged annually to devote to the payment of such taxes and expenses some portion of the

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income derived from other portions of the trust fund in his hands, and which otherwise would be divided among said four sons of the testator.

The defendant demurred to the bill, upon the ground that the legislature had no constitutional power to pass said resolve.

S. Bartlett, for the defendant.

J. J. Clarke & L. Shaw, Jr. for the plaintiff.

MERRICK, J. The original object of the defendant in filing a demurrer to the bill is avowed to have been to bring into question the validity of the resolve of 1857, *c.* 60, by which the plaintiff is, in distinct terms, vested with authority to make sale of sundry estates held by him as trustee under the will of Thomas Cordis. But whatever doubts he may formerly have entertained on the subject, it is now conceded in the written argument of his counsel submitted to our consideration, that, upon the authority of cases heretofore determined in this court, it cannot now be successfully contended that the legislature was incompetent, by reason of any provision in the Constitution, to pass the resolve.

It is certainly well settled that property held in trust, or for life with remainder limited over to persons either known or unknown, is not absolutely uncontrollable, nor necessarily to be preserved unchanged in the same form and condition in which it was when it was first received under the original grant or devise. By the authority of the legislature, and under suitable restrictions, it may be sold, or otherwise disposed of, if adequate provision is made to secure the rights of all persons and parties who already have or may afterwards become entitled to an interest in it, and in such manner that whatever is received in exchange or compensation for it shall be substituted in its place, and be impressed with the same obligations and devoted to the same ends, purposes and use. *Rice* v. *Parkman*, 16 Mass. 326 *Davison* v. *Johonnot*, 7 Met. 388. In the case of *Sohier* v *Massachusetts General Hospital*, 3 Cush. 483, it was held that a legislative resolve authorizing the sale in fee of certain estates held by trustees under devises contained in the last will of Benjamin Joy, so that his daughters should always during their

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lives respectively enjoy the income thereof, and that the premises should at their decease go to their issue if any, otherwise to their heirs, was a legal and valid enactment, and in no respect conflicted with any provision in the Constitution. It is impossible to distinguish the present from that carefully considered case, either in reference to the devise, the use and enjoyment or the ultimate destination of the property; and upon its authority the demurrer must be overruled.

It is suggested by the defendant's counsel, as a possible objection to the validity of the resolve, that if the authority it purports to confer should be executed, the intention of the testator, that the real estate upon which it operates, whether productive of income or otherwise, should not be alienated during the lifetime of his sons, may thereby be defeated. This may perhaps be admitted to be a natural, or even a necessary, consequence of a full execution of the power which is conferred. But this can make no difference; since the disposition and control of property by its owner is always subordinate to the dominion of the law and subject to be regulated by its provisions. The testator must be presumed to have understood the limitations as well as the extent of his rights over the estate which was the subject of his devise.

For the same purpose the counsel for the defendant has brought to our notice another but not dissimilar consideration. He puts forward the supposition that the property devised may, after the termination of the intervening life estates, come to be of much greater value than it is at present; and that if it be permitted now to be sold, they who are to take in remainder, since they can have no more than the principal for which it is disposed of, will receive much less than they would have become entitled to if it had been left wholly unmolested. This is a result which is certainly possible; but, on the other hand, their interest may be greatly promoted by the change. It was therefore in this, as it must unavoidably be in all similar cases, a mere question of expediency, to be authoritatively solved and determined by the legislature, acting in its capacity as the common guardian of the whole community. The power to author-

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ize the change of an investment, or the sale of property devised to the use of successive donees, necessarily imposes upon it the corresponding duty of deciding definitively at what times, and under what circumstances, their several rights and interests require, or may justify, its exercise. *Demurrer overruled.*

JONATHAN P. BISHOP *vs.* JAMES HALL, Executor.

Evidence that legal services were rendered in the joint names of an attorney at law and another person is not sufficient to prove a partnership between them, and thus defeat an action for such services brought by the attorney alone.

ACTION OF CONTRACT on an account annexed for services rendered and money paid by the plaintiff as an attorney at law, between December 1851 and April 1852. Answer, that the services were rendered and the money paid by the plaintiff and William End, partners under the name of Bishop & End. The case was referred to an auditor, who, without passing upon the question of partnership, reported in favor of the plaintiff, subject to the opinion of the court upon the following evidence:

"The pleadings and other papers filed in court in two cases, named in one item of the account annexed, were produced, by which it appears that in one case the writ was in Bishop's handwriting, the attorney's certificate and directions to the officer were signed by Bishop, the writ was indorsed by Bishop & End, and was entered in the names of Bishop & End, and that an agreement for neither party to be entered in said action was signed by Jonathan P. Bishop alone, as attorney; that the answer in the other case was signed by Jonathan P. Bishop and William End, as attorneys for the defendant, and certified by Jonathan P. Bishop and William End, the certificate being in the handwriting of End; that an agreement for the reference of said action was signed by Jonathan P. Bishop and Bishop & End; and it appeared by the account of the clerk of the court against

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Bishop, that there were charges therein against Bishop & End, which charges were paid by Bishop, in the settlement of his account.

"There was evidence introduced of a declaration made by the plaintiff, in 1851 or 1852, that End was a partner of the plaintiff, though the language of said declaration was not given. There was also evidence that End was an alien."

At the trial in the court of common pleas, the plaintiff offered the auditor's report in evidence. The defendant objected, on the ground that it showed that End was the plaintiff's partner and should have been joined as a plaintiff, and so there was a variance. But *Sanger*, J. overruled the objection, and admitted the evidence, and, upon being requested by both parties to express an opinion upon it, ruled that there did not appear to be a partnership between the plaintiff and End, and that the plaintiff was entitled to recover. The defendant alleged exceptions.

J. F. Woodside, for the defendant.

W. Colburn, for the plaintiff.

Shaw, C. J. It appears to us that the evidence was admissible. The object of referring a case to an auditor is, that he may examine vouchers and other evidence, and state an account upon all matters in controversy between the parties which are the proper subjects of an account. In one alternative, to wit, no partnership, these items were all subjects of an account. The auditor therefore states the evidence upon which the partnership depends, without any opinion, for the consideration of the court, and finds the amount due to the plaintiff if no partnership should be established.

The court are of opinion that this report was admissible as a report under the statute. *Jones* v. *Stevens*, 5 Met. 373. But when admitted, it was *prima facie* evidence, it might be disproved, impeached or controlled by any other competent evidence. Rev. Sts. *c.* 96, § 30.

Upon the facts reported, it was contended that Mr. End was a partner with the plaintiff, and should have been joined. It is to be considered that, in order to sustain this defence, it must appear that Mr. End was in fact a partner with the plaintiff,

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and entitled equally with him to maintain the suit. It is not enough that parties hold themselves out or suffer themselves to be held out as partners; this might be sufficient to charge them as defendants, either in contract, or for negligence or want of skill; but the same proof, when partnership was set up to prevent one from recovering, would wholly fail of establishing it *Kell* v. *Nainby*, 10 B. & C. 20. *Lloyd* v. *Archbowle*, 2 Taunt. 324. *Mawman* v. *Gillett*, 2 Taunt. 325 note.

The report states some evidence tending to show that the plaintiff and Mr. End have in some instances used the joint signature, in court and elsewhere; but this is not unfrequent where two attorneys or counsellors act together in a particular case under separate retainers. We should think this evidence entitled to more careful consideration, were it not found as a fact, that Mr. End was an alien, and therefore could not be admitted as a counsellor and attorney. Rev. Sts. *c.* 88, § 19. It is true that was partially modified by *St.* 1852, *c.* 154, under which Mr. End might have been admitted, (and, as we happen to know, was afterwards admitted,) yet it was prospective only, and was after the retainers in these cases must have been given to the plaintiff, and nearly, if not quite, all the professional services were done. As the services could not have been legally performed by Mr. End, and no action for them could have been maintained; in the absence of any proof tending to show that he acted, not as a qualified attorney and counsellor, but as an attorney *in pais* under a special power, the court are of opinion that no such partnership was shown by the evidence, as to prevent the plaintiff, a regularly qualified counsellor and attorney, as the court must officially take notice of, from recovering.

Exceptions overruled.

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JAMES L. BATES *vs.* INHABITANTS OF EIGHTH SCHOOL DISTRICT IN WEYMOUTH.

A person residing in one town and carrying on his trade in another town, where he hires a shop, is not liable to be assessed on his stock in trade for money raised to build a school-house in the district where he resides, under the Rev. Sts. *c.* 7, § 10, and *c.* 23, § 33.

ACTION OF CONTRACT to recover back the amount of a tax assessed by the defendants upon the plaintiff's stock in trade in Boston, (where the plaintiff hired and occupied a shop, and had his usual place of business, and paid taxes on his stock,) for the purpose of building a new school-house in the eighth school district in Weymouth, in which the plaintiff resided. The plaintiff had no personal property in Weymouth, and paid the tax under protest. The case was submitted to the judgment of the court upon these facts.

J. J. Clarke, for the plaintiff.

S. Wells, for the defendants. By the express language of the statute, "in raising and assessing money in the several school districts, every inhabitant shall be taxed in the district in which he lives, for all his personal estate." Rev. Sts. *c.* 23, § 33. Section 37 requires the assessment to be made "in the same manner," not on the same property, "as town taxes are assessed" The Rev. Sts. *c.* 7, §§ 9, 10, apply only to taxes by towns for town purposes, which are governed by different rules from school district taxes. *Pease* v. *Whitney*, 5 Mass. 380. *Taft* v. *Wood*, 14 Pick. 362. *Savary* v. *School District in Georgetown*, 12 Met. 178. The general provision of *c.* 7, § 16, that the assessors shall assess "according to the rules prescribed in this chapter" all school district taxes, refers only to general rules, and is controlled by the specific rule of *c.* 23, § 33.

The general rule is that personal property shall be taxed where the owner resides. Of two exceptions to this rule in the case of town taxes — property where the owner does business; and machinery in corporations — the second is expressly carried into the school district law, but not the first, and a third excep-

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tion added, of land not under his actual improvement, thus showing an intentional omission of the exception of stock in trade. Rev. Sts. *c.* 7, § 9; § 10, *cls.* 1, 2; *c.* 23, §§ 33, 34. The exemption from taxation of the property and polls mentioned in Rev. Sts. *c.* 7, § 5, is an absolute exemption, and not a mere exception as to the place of taxation, and therefore did not require to be repeated in *c.* 23.

The defendants are a corporation, of which the plaintiff is a member, and liable to taxation in the same manner as a member of a parish. Rev. Sts. *c.* 23, §§ 27, 28, 57, 58; *c.* 20, §§ 18, 30.

Public policy and reason require that persons should be taxed on their stock in trade, for building school-houses in the district where they reside and their children attend school. It is no conclusive objection, that by going into another town to trade, the plaintiff has subjected himself to double taxation. *Tremont Bank* v. *Boston*, 1 Cush. 142. By the rule contended for, if the plaintiff should do business in another town where the district system also prevailed, he would escape taxation altogether for building school-houses.

Dewey, J. This case presents a new question of taxation, and requires a judicial construction of different provisions on that subject, that are apparently somewhat in conflict. If we were to look solely at the enactment found in Rev. Sts. *c.* 23, § 33, we should find the provision to be that "in assessing money in the several school districts, every inhabitant of the district shall be taxed in the district in which he lives, for all his personal estate." This provision, literally construed, and disregarding other statute provisions on the subject of taxation, would fully authorize the assessment in the present case, and justify the defendants in retaining the money received by them from an assessment upon the plaintiff.

The Rev. Sts. *c.* 7 contain the more general provisions regulating the whole subject of taxation. Among other provisions of this chapter, those of section 10, *cl.* 1, are important to be considered. By that clause it is enacted "that all goods, wares and merchandise or any other stock in trade, in towns within the

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state, other than where the owners reside, shall be taxed in those towns, if the owners hire or occupy stores, shops or wharves therein, and shall not be taxable where the owners reside." The tax assessed upon the plaintiff for a school district tax was upon property embraced in the section just recited, being stock in trade in Boston, the plaintiff hiring and occupying a shop in Boston. As respects an assessment under any votes of the town of Weymouth raising money, there can be no question but that the plaintiff's property in Boston was exempt therefrom, the same being by statute the subject of taxation for all municipal objects solely in Boston.

The inquiry then arises whether the provisions of *c.* 23, § 33, are to be taken in their broadest sense, or to be qualified by the statute last cited, and other general enactments regulating the system of taxation. When therefore it is said that every inhabitant of the district shall be taxed for "all his personal estate," is it to be understood as meaning literally all his personal property, or only as meaning all that might be taxed for municipal purposes by the town in which the district is situated? There are no words of exception, not even of articles exempt by the general law from taxation, and literally all his household furniture, his wearing apparel, tools of trade, and all those articles exempt from taxation by clauses 4 & 6 of *c.* 7, § 5, would be liable to be taxed for a school district tax. We do not suppose however that it was intended thereby to authorize school districts to raise money by assessment on the property thus exempted.

In practically following out this matter more fully, it will be perceived that the property which was taxed by the assessors of Weymouth under a vote of the school district, for the purposes of building a school-house, was liable to taxation in Boston, and was *in* fact taxed in Boston for similar objects. The statute authorizes the inhabitants of each town, if they shall see fit, to raise money for building school-houses at the common expense of the town, instead of resorting to district taxation. This is done in the larger towns and cities. This property of the plaintiff was by the general law of taxation therefore liable to

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assessment for all municipal purposes, including building school-houses, in Boston, the assessment being general, and embracing all sums voted by the municipal authorities for school-houses and other charges. It will be seen that double taxation must of course result from giving that effect to *c.* 23, § 33, which the defendants urge upon us. Seeing this result, we are to consider whether the expression in *c.* 23, § 33, "all his property" must not be limited, and be taken and construed with reference to the previous provision in *c.* 7, § 10.

It seems to us the more proper construction of the statute to hold that the stock in trade in Boston, which is by law there taxable for all objects, is thereby withdrawn from all further liability for taxation for similar objects elsewhere, and is not the subject of a school district tax in Weymouth. It is quite obvious that if Weymouth had adopted the system of many other towns, and which it was authorized to adopt, that of building its school-houses at the common expense of the town, no tax could have been assessed on this property in Boston by Weymouth, for money raised to build school-houses. This fact seems to bear very strongly upon the effect to be given to the argument, much pressed upon us, that public policy and reason require, and the legislature must be presumed to have designed, that an inhabitant of a school district dwelling therein, and having the benefit of the school-house for educating his children, should be assessed upon all his property invested in trade or business wherever it might be. But it has already been seen that such would not be the case, if the town at large provided such school-houses.

Again; if this argument has any weight, we should expect to see it practically applied to another portion of taxation of much greater relative importance, that of assessment for money raised annually for the support of schools. In the benefits of this money thus raised the plaintiff has a direct participation, and should therefore be taxed for it by an assessment on all his property wherever situated, quite as much as he should for the purpose of building a school-house. Yet it is an uncontroverted fact that his stock in trade in Boston in a store there is not

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liable to be assessed for a dollar of the money raised by the town of Weymouth for supporting a school in the district in which the plaintiff resides.

We come to the result therefore that this stock in trade in Boston is not to be taxed for building a school-house in Weymouth, upon the vote of the district in which the plaintiff was an inhabitant, and that for such purposes its liability to taxation is limited to Boston.

It was suggested in the argument for the defendants that a somewhat analogous case of property liable to taxation elsewhere, being also made liable to a local taxation in the place of the residence of the owner, might be found to exist in relation to assessments for the support of religious worship as provided by Rev. Sts. *c.* 20, §§ 18, 30. No doubt such taxation under that statute may reach property that was not liable to a town assessment upon the same individual, as all his property (not exempt from taxation) and all his real estate within the State may be thus assessed. But the same statute obviates all the objections arising from double taxation by the further provision that no person shall be liable to any tax for the support of religious worship, to any other parish or religious society than that of which he is a member.

Another ground, upon which some reliance seemed to be placed, was, that the Rev. Sts. *c.* 23, §§ 33, 36, 38, had made provisions discriminating between lands owned by an inhabitant of a school district, and not under his cultivation, as well as for the cases of real estate and machinery belonging to manufacturing corporations, and of real estate owned by nonresidents, providing how and where they shall be taxed; and having made these exceptions, it is said that this excludes the idea of any other exception of property of the inhabitants of the district. It will be seen however that all these provisions relate to property situated within the town, and go no further; and we do not think the argument from this source sufficient to control the other considerations which have led us to the result already stated, that the personal property of the plaintiff, subject by the provisions of *c.* 7, § 10, to be taxed in Boston for all municipal

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purposes, including that of building school-houses, was withdrawn from all liability for taxation for building a school-house in Weymouth, of which the plaintiff was an inhabitant.

Judgment for the plaintiff.

ELI HAYDEN *vs.* MICHAEL AHEARN.

The owner of land having upon it a house occupied by a tenant at will conveyed away the land, reserving by parol a right to remove the house within six months, and the tenant continued in possession, paying rent to him, until after the expiration of the six months, and continued in possession after an alienation of the land by his grantee. *Held*, that the second grantee might maintain a landlord and tenant process against such tenant.

Removal of the defendant and possession taken of the premises by the plaintiff, pending a landlord and tenant process, afford no defence, even if shown by an agreed statement of facts, unless pleaded *puis darrein continuance*.

ACTION on the Rev. Sts. *c.* 104, to recover a house and land in Randolph, commenced on the 7th of May 1856 before a justice of the peace, and removed at the defendant's request, and because the title to the freehold was brought in question, into the court of common pleas, and submitted to that court at September term 1857, and, on appeal, to this court, upon the following statement of facts:

On the 10th of January 1854 Simeon White conveyed this land, "with the buildings thereon," by warranty deed to Theophilus W. Whiting, who on the 19th of February 1856 conveyed the same to the plaintiff, who immediately notified the plaintiff of the sale and to quit. White, at the time of the conveyance to Whiting, reserved to himself by parol the right to remove from the land within six months next ensuing this house, then occupied by the defendant as his tenant at will, who remained in possession until December 1856, when he quitted it, having paid rent to White until December 1855, since which he has not paid any rent, and has said that he would not pay any. The premises, except the house, have been

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in the plaintiff's possession ever since the conveyance to him. After the defendant left the house, the plaintiff took possession of it, and sold it to another person, who, pursuant to the conditions of sale, removed it from the land.

J. M. Gourgas, for the plaintiff.

E. Avery, for the defendant, cited *Saunders* v. *Robinson*, 5 Met. 343; *Larned* v. *Clark*, 8 Cush. 29; *Green* v. *Tourtellott*, 11 Cush. 227; *Howard* v. *Merriam*, 5 Cush. 574; *St.* 1852, *c.* 312, § 24.

Shaw, C. J. This case seems to be very clear. The defendant was tenant at will to White. White conveyed in fee to Whiting. The reservation by parol being a reservation of an interest in land by parol, was void; besides, if valid, it was a right to enter and remove the building within six months, and, not being exercised within that time, was at end. By the conveyance to Whiting, the tenancy at will from White terminated, especially after the six months; and if the defendant continued longer, he was tenant at will to Whiting, whether he paid rent or not. Whiting had the fee and the full right of possession, and therefore the defendant, if he continued by his permission, was his tenant at will. By the conveyance in fee by Whiting to the plaintiff, the tenancy at will of the defendant was determined, and the plaintiff had a right to enter; he did enter, and, the defendant not having surrendered, this process was commenced, and we think the plaintiff had a right to it. *Howard* v. *Merriam*, 5 Cush. 563.

As to the point that the plaintiff was not entitled to judgment, because during the pendency of the process he entered and took possession, it is fully answered by the case of *Crosby* v. *Wentworth*, 7 Met. 13, which decided that it must be pleaded as a plea *puis darrein continuance*, even where, as in the present case, it came up upon an agreed statement of facts.

Judgment for the plaintiff.

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JOHN A. FISCHER & another *vs.* AARON A. MORSE & another.

In replevin of goods, to which the defendant pleads title as assignee in insolvency of one now deceased, the plaintiff is not a competent witness, under *St.* 1857, *c.* 305, to prove that the goods were fraudulently obtained from him by the deceased.

REPLEVIN of goods. The answer denied the plaintiffs' property, and the unlawful taking or detaining; and set up title in the defendants as assignees in insolvency of Samuel Allen.

At the trial in the court of common pleas, the plaintiffs contended, and offered to prove by the testimony of one of them, "that the goods in question were the property of the plaintiffs, and were delivered by them to Allen before the date of the proceedings of insolvency, under a contract of sale made by them with him, which was procured by certain false and fraudulent representations made by Allen to the plaintiffs, touching his own solvency and pecuniary condition, which sale, they contended, was thereby rendered void or voidable, and that they, having the right so to do, replevied these goods from the assignees, for the purpose of rescinding the contract of sale so made with the insolvent." The defendants objected "that the said plaintiff was incompetent to testify, on the ground of the decease of Allen." *Perkins*, J. so ruled, the jury returned a verdict for the defendants, and the plaintiffs alleged exceptions.

J. A. Andrew & W. Lovering, for the plaintiffs. The plaintiff was a competent witness under the *St.* of 1857, *c.* 305, § 1. The proviso excluding the adverse party, "where one of the original parties to the contract or cause of action in issue and on trial is dead," does not apply to this case, in which the "issue" on trial was the tortious taking and detaining of the goods by the defendants, to which the deceased was no party. The "contract or cause of action in issue" is as if it had said "the contract or other matter sued upon." The object was to exclude only when a party to the record or to the contract declared on was dead. The contract made by the plaintiffs with Allen was a mere incident in the case, not the substance, or the

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issue. If the defendants' construction prevails, any remote circumstance of the case, occurring between parties not on the record, may defeat the plaintiffs' claim.

E. Wilkinson, for the defendants.

THOMAS, J. The real matter in issue and on trial was the validity of the sale from the plaintiffs to Allen, the insolvent. It was upon this matter, that one of the plaintiffs was offered as a witness. The other party to that contract of sale was dead. The taking that was on trial was the taking by Allen under the contract of sale. The witness was clearly within the reason and purpose of the limitation of the statute, if not within the letter.

Exceptions overruled.

ELIPHALET FISHER *vs.* JOHN SMITH.

A conveyance of land "bounded on" a private way leading to the grantor's dwelling-house carries the fee to the centre of the way.

Evidence that a grantor, about the time of executing a deed of land bounded on a way, built a wall and established bounds at the edge of the way, is inadmissible to prove that the way did not pass by the deed.

ACTION OF TORT for breaking and entering the plaintiff's close in Dedham, and cutting down trees and digging up and carrying away the soil.

At the trial in the court of common pleas at December term 1855, before *Byington*, J., it appeared that the *locus in quo* was a strip, two or three rods wide, of land conveyed to the plaintiff on the 16th of July 1844, and had been used time out of mind as part of a road or passage way leading from the old Providence road, now called Walpole Street, northwesterly to the plaintiff's dwelling-house, and to wood lots and pasture of other persons using the way.

The defendant justified the acts complained of under a claim of ownership in the fee of the way, westerly of the centre

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thereof, under a deed from the plaintiff to him dated July 16th 1844, of "a certain tract of land situated in the South Parish of said Dedham, containing five acres, more or less, bounded easterly on the road or leading way from my dwelling-house to the old post road, so called; southerly, on said old post road," &c. The court ruled that this deed conveyed to the defendant the fee in the land to the centre of said road or leading way, subject to the right of way of the plaintiff and others, as aforesaid; and ordered a verdict to be rendered for the defendant.

The plaintiff offered to prove "that, about the time said deed was given by him to the defendant, the defendant caused a wall to be built from Walpole Street, northwesterly, along and upon the westerly line of said road or passage way, several feet from the travelled path, and extending the greater part of the distance; that the defendant's land was bounded on said road or passage way, leaving a road or passage way fenced on both sides, some two rods in width; that at the northeasterly corner of the premises described in said deed, there was, at the time it was given, a stake and stones several feet westerly of the travelled path of said road or passage way, and in a line with said wall built by the defendant; that soon after said deed was given, the defendant tipped up a row of stones most of the way between the end of said wall and said stake and stones, and in a line therewith, designing them as the foundation of a wall; that said wall and row of stones and stake and stones now remain, and have been repeatedly recognized by the defendant, by his acts and declarations, as the line of his land next to said leading way; that said road or leading way is and always has been chiefly used by the plaintiff as a passage way to his house and farm, though several other persons have a right of way over it to their wood and pasture lands, lying back from said Walpole Street." The court ruled that this evidence was not admissible for the purpose of controlling or varying the construction of the deed.

It was admitted that the acts of trespass complained of were done westerly of the centre of said way, between the travelled part of said way and said wall, row of stones, and stake and stones.

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A verdict was returned for the defendant, and the plaintiff alleged exceptions.

W. Colburn, for the plaintiff. 1. The "road or leading way" described was a private way, and the plaintiff's deed only conveyed to the defendant the fee in the land to the westerly margin of the way. *Webber* v. *Eastern Railroad*, 2 Met. 150. *Allen* v. *Murdock*, 13 Mass. 256. *Sibley* v. *Holden*, 10 Pick. 249. *Parker* v. *Framingham*, 8 Met. 261. *Tyler* v. *Hammond*, 11 Pick. 193. *O'Linda* v. *Lothrop*, 21 Pick. 292. *Clap* v. *M'Neil*, 4 Mass. 589. *Morgan* v. *Moore*, 3 Gray, 320. *Storer* v. *Freeman*, 6 Mass. 436. *Jones* v. *Cowman*, 2 Sandf. 234. The rules applicable to rivers and public highways do not extend to private ways. This deed is to be construed as if it had described the land conveyed as bounding on the grantor's land, used as a road or leading way from his dwelling-house. The plaintiff cannot be presumed to have intended to convey the fee in any part of land so important to him as the leading way to his own dwelling-house. In the case of a public highway, to retain the fee of the land would be of no benefit to him.

2. The evidence offered should have been admitted, as showing the intention of the parties, and having an important bearing on the construction of the deed. *Webber* v. *Eastern Railroad*, 2 Met. 150. *Parker* v. *Framingham*, 8 Met. 261. *Stone* v. *Clark*, 1 Met. 378.

E. Wilkinson, for the defendant. 1. It is now well settled that a deed bounding the grantee on a highway carries his line to the centre of the highway. *Newhall* v. *Ireson*, 8 Cush. 595. The boundary "on the road or leading way," is not merely descriptive, but is an implied covenant that there is such a road or leading way for the benefit of the estate granted. *Parker* v. *Smith*, 17 Mass. 413. The road or leading way had been in existence and use time out of mind. It was in use at the time of the conveyance, and as such recognized by the parties, and referred to as a monument. It is therefore immaterial whether it had ever been laid out and established by the public authorities. It falls under the rule applicable to such monuments as stone walls, ditches, rivers and highways, the centre of which is

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held to be the intended line, unless the deed contain some controlling clause to the contrary. *Hammond* v. *McLachlan*, 1 Sandf. 323. *Warner* v. *Southworth*, 6 Conn. 471. *Claremont* v. *Carlton*, 2 N. H. 369. *Enfield* v. *Day*, 11 N. H. 520. *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 492.

2. The evidence offered by the plaintiff was incompetent to establish by parol a claim to a strip of land between the defendant's and this road or leading way, against the express terms of his deed. *Enfield* v. *Day*, 11 N. H. 520. *Pride* v. *Lunt*, 19 Maine, 115. *Lowell* v. *Robinson*, 16 Maine, 357.

The defendant retains the fee of the land thrown by himself into the road or leading way adjacent to his estate for purposes of improvement. But it would make no difference, if the defendant had built his fence under a misapprehension as to the true line of the road or leading way. *Green* v. *Chelsea*, 24 Pick. 71. *Cleaveland* v. *Flagg*, 4 Cush. 76.

By the Court. 1. The rule is well settled in this commonwealth, that a deed of land bounded on a highway laid out over land of the grantor passes the fee to the centre of the way, where there is nothing in the deed to require the opposite construction. A majority of the court are of opinion that the same rule extends to private ways.

2. Such being the necessary legal construction of the deed, no parol evidence is admissible to control it. In the cases cited by the counsel for the plaintiff in favor of its admission, either the language of the deed was ambiguous, or the evidence was admitted simply to explain the instrument by applying it to the location and subject matter. *Exceptions overruled.*

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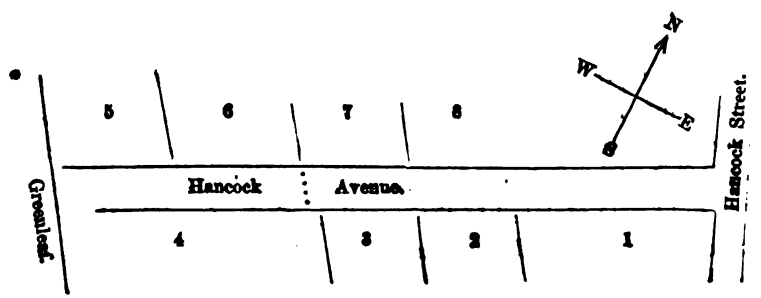
Clift Rodgers *vs.* William Parker.

A deed bounding land on a way shown on a plan, which is referred to in the deed and afterwards recorded by the grantor in the registry of deeds, estops the grantor and those claiming under him to obstruct the way opposite the land granted and within its side lines, if produced at right angles to the course of the way; even if outside of those lines as continued in the direction in which they and all similar lines of other lots on the same way run, and although at that end the way does not connect with any other.

Action of tort for breaking and entering the plaintiff's close in Quincy, and breaking down the plaintiff's fence. The parties submitted the question whether the action could be maintained to the decision of the court upon the following facts:

On the 24th of April 1855 William P. Apthorp offered for sale by public auction house lots on the Apthorp estate in Quincy. The auctioneer exhibited a plan at the sale, (the material part of which is printed in the margin,*) and distributed copies thereof among the persons who attended. Lot 7 was bid off by the defendant; lot 1 by the plaintiff; and lots 2, 3 and 8 by other persons. Deeds were soon afterwards made by Apthorp to the purchasers, and recorded, describing each lot by its number on this plan, (declared therein to be "recorded with the deed of lot numbered one on said plan,") and as bounded "on a passage called Hancock Avenue on said plan." That avenue was staked out at the time of the auction.

After this sale, and before these deeds were made, Apthorp sold and conveyed lots 4, 5 and 6, together with all that part of Hancock Avenue lying west of a straight line drawn from the



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southeast corner of lot 6 to the northeast corner of lot 4, to the plaintiff, who afterwards erected a fence across the avenue at the dotted line on the plan. The defendant, some days after requesting the plaintiff to remove the fence, removed it himself, without injuring the materials, and left them by the side of the avenue.

G. White, for the plaintiff. An implied covenant of a right of way must be construed most strictly; the principle being that nothing will pass as incident that is not necessary to the enjoyment of the principal thing granted. *Pinnington* v. *Galland*, 9 Exch. 1. *Harding* v. *Wilson*, 2 B. & C. 96. *Salisbury* v. *Andrews*, 19 Pick. 258. *Davenport* v. *Lamson*, 21 Pick. 74. *Nichols* v. *Luce*, 24 Pick. 104.

A grantor of land, who in his description bounds the same on a private way, of which he is the owner, impliedly covenants that the grantee shall have a right of way from a public street to the extent of the land granted, but no farther, unless the other terminus of said private way is also on a public street. *Parker* v. *Smith*, 17 Mass. 413. *Gayetty* v. *Bethune*, 14 Mass. 49. *Ballard* v. *Dyson*, 1 Taunt. 279. *Campbell* v. *Lang*, 28 Eng. Law & Eq. 30.

J. J. Clarke, for the defendant.

Dewey, J. As to the right of the defendant to have an open avenue or way, coextensive with the extent of the lot purchased by him, there can be no question. The sale to the defendant was made by one having the entire estate, and was a sale by public auction of house lots laid out and numbered on a plan then exhibited; said lots being bounded by Hancock Avenue, which was also delineated on the plan, which plan was afterwards recorded in the office of registry of deeds. In this state of the facts, the grantor and those who succeed to his title to the remaining land are estopped from denying that there is such a way. Treating the right of the defendant to be of the more restricted character, of a way coextensive with his house lot, this right was violated in the erection of the fence in the line in which it was placed, the same not being at right angles with the avenue.

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But the farther ground of defence that the defendant, as purchaser of lot No. 7, may require that the entire avenue as staked out at the time of the auction sale and delineated on the plan shall be kept open as an avenue, having been also urged at the argument, we have also considered that question. This subject has recently been before us for our consideration in the case of *Thomas* v. *Poole*, 7 Gray, 83, under facts somewhat similar — a way staked out and to be opened by the grantor, the lot sold described as bounded in such way, but having more distinctly stated by words in the recital the extent of the new way. In the present case, the extent of the avenue is clearly marked upon the plan, and is as readily ascertained thereby as it would have been by a recital in words.

In the case of *Thomas* v. *Poole*, the court held that the way thus staked out and upon a part of which the lot sold was bounded, was to be kept open for its entire distance, as thus staked out and exhibited to purchasers, and that the right to have the same kept open was not limited to the extent of the land conveyed to any particular purchaser of one lot. It seems to us that the same principle is applicable to the present case, and that the entire avenue, as staked out and delineated on the plan exhibited at the sale and afterwards recorded, was as respects the plaintiff to be kept open as an avenue. In either aspect of the question the defence is well maintained.

Judgment for the defendant.

OBED ROBINSON *vs.* CYRUS K. ROBINSON.

A bond made by a grantee of real estate to his grantor, in consideration of the conveyance, and conditioned to support his grantor for life, and, in case of neglect, to reconvey the land, does not constitute a mortgage; but, in case of neglect so to support, may be enforced in equity by decreeing a reconveyance.

ACTION OF CONTRACT, praying relief in equity. Writ dated January 28th 1856.

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The declaration alleged that the plaintiff on the 15th of June 1854, in consideration (as expressed in the deed) of a contract made by and between him and his son the defendant, for the support of the plaintiff and his wife during their lives, (for a full description of which reference was made to a bond of the same date,) conveyed to the defendant in fee his house, farm and other lands in Wrentham and Attleborough; that at the same time the defendant executed a bond to the plaintiff "to discharge all his right, title and interest into" said farm and lands conveyed to him, "and if the said Cyrus Robinson shall neglect to perform the conditions of this bond, as shall be hereafter specified, he shall then give a good and sufficient deed of said farm and lots and buildings to the said Obed Robinson. Conditions: That Cyrus K. Robinson aforesaid shall support the said Obed Robinson and Abigail Robinson, wife of said Obed Robinson, during their natural lives; they shall be well clothed, and shall have good and wholesome victuals, and all they shall require for their support and sustenance; and they are to have a horse and carriage, whenever they shall require the same for their use. The said Cyrus K. Robinson shall have all the farming tools, horse, cattle, wagons. The furniture is to be to the use of the said Cyrus, so long as the said Obed and Abigail Robinson shall live; then it is to go to their heirs. The said Cyrus is to pay all taxes on real and personal property." The declaration averred that the defendant entered into possession of the lands under the deed, but had neglected to perform the conditions of the bond; and prayed for a decree for a reconveyance of the farm and lands, and for other relief in equity.

The answer admitted the execution of the deed from the plaintiff to the defendant, and of the bond from the defendant to the plaintiff, and submitted their construction to the court; and denied any breach of the conditions of the bond.

At the hearing before *Bigelow*, J., a jury found that the defendant "did neglect to perform the condition of the bond set out in the writ and declaration, as the conditions are specified in the said bond;" and it appeared that the plaintiff had tendered to the defendant for execution and delivery to the plaintiff

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a deed of quitclaim of the premises, but the defendant refused to execute and deliver it.

The plaintiff moved for judgment on the verdict, and a decree that the defendant should reconvey the premises to the plaintiff. The judge reserved for the consideration of the whole court the question whether the plaintiff was entitled to such reconveyance, and, if so, the form in which it should be made.

E. Ames, for the plaintiff.

E. H. Bennett, for the defendant. Were not this deed and bond a mortgage, giving the plaintiff, in case of a breach, a remedy at law, but not entitling him to a reconveyance in equity? Rev. Sts. c. 107, §§ 6, 23, 34. *Lanfair* v. *Lanfair*, 18 Pick. 299. *Hoyt* v. *Bradley*, 27 Maine, 242. Or if the transaction is not in law a mortgage, is it not so much in the nature of one, that the defendant ought in equity to have such rights as he would have under a mortgage, namely, a conditional judgment, as in *Wilder* v. *Whittemore*, 15 Mass. 262, and *Fiske* v. *Fiske*, 20 Pick. 499. In *Austin* v. *Austin*, 9 Verm. 420, a bill to foreclose a mortgage, given to support another, a decree was entered for compensation for past maintenance and for payment for future support.

By the Court. The deed and bond set out in the declaration, and admitted by the answer, did not constitute a mortgage. There was no conveyance from the supposed mortgagor to the supposed mortgagee of any interest in the land. It is not as if the defendant, after receiving the plaintiff's deed, had made a conveyance back to the plaintiff, taking a bond for a reconveyance on the performance of certain conditions. In that case there would be a conveyance from the defendant to the plaintiff, which by reason of the bond of defeasance might be deemed conditional, and a mortgage. But in the case at bar the deed was made to, not by, the person by whom the conditions were to be performed.

The defendant's stipulation for the support of the plaintiff and his wife was not a limitation of his estate; nor a condition, according to the technical meaning of that word in conveyances

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of real estate, a breach of which would give the plaintiff a right of reëntry; but simply a covenant, which may be specifically enforced in equity. 4 Kent Com. (6th ed.) 7 134–136. *Wheeler* v. *Dascomb*, 3 Cush. 285. *Doe* v. *Phillips*, 2 Bing. 18.

A decree may be entered that the defendant, within fifteen days, execute, acknowledge and deliver to the plaintiff a deed of release and quitclaim in common form, with covenants of warranty against all persons claiming by, through or under the defendant, of all the lands described in the deed of the plaintiff to him, dated June 15th 1854, and deliver up the possession of said lands to the plaintiff, so that the plaintiff may be revested and repossessed thereof as of his former estate; and that in case of the neglect of the defendant within said fifteen days to execute, acknowledge and deliver such a deed and deliver up possession as aforesaid, and upon affidavit of the plaintiff or his counsel to such neglect, filed with the clerk of this court, then at any time after the expiration of said fifteen days, and within a year from the entry of this decree, the clerk issue a writ of *habere facias*, with a copy of the decree annexed, to the plaintiff against the defendant, for said lands, in order that upon the plaintiff's being restored to the possession thereof under and by virtue of said writ, and due return and registration of said writ and return in the registry of deeds, the plaintiff may be revested of and in said lands as of his former estate and as he was seised and possessed thereof before the execution of his deed to the plaintiff; and that the plaintiff have his costs of the defendant, and his execution therefor in common form.

Decree accordingly.

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COMMONWEALTH *vs.* CITY OF ROXBURY

An information on Rev. Sts. c. 108, to recover lands below low water mark, and more than one hundred rods below high water mark, sufficiently describes the title of the Commonwealth by averring that it was "the owner in fee of all said channels, lands and flats."

An information on Rev. Sts. c. 108 against a town does not admit its title in fee in flats sought to be recovered, by describing them as situated in that town.

The Massachusetts Colony Charter conveyed to the grantees all public and private rights in the seashore between high and low water mark.

A grant of land by the colonial government before the ordinance of 1647 did not pass the soil of the seashore between high and low water mark, without express words.

The order of the general court of 1636, "that all the rest of the ground lying between Dorchester bounds and Boston bounds shall belong to the town of Roxbury, easterly of Charles River, (except the propriety of the aforesaid town, which they purchased of particular persons,) Roxbury not to extend above eight miles from their meeting-house," did not grant to the town of Roxbury the title to the flats lying between Boston bounds and Dorchester bounds, more than one hundred rods below high water mark.

An act establishing a mill corporation, with authority to exclude the tide waters from a portion of the flats of the Commonwealth, and to use it as a basin for the purposes of a mill power, does not release the title of the Commonwealth to such flats.

A committee appointed to settle the boundary between two towns, in their report, which was accepted by both towns, defined a line by bounds, courses and distances, and added, "Some deviations from the original or natural boundary and some exchanges of territory are involved; and consequently it is supposed that the sanction of the legislature will be necessary to render valid the arrangement agreed to." The legislature afterwards passed an act declaring that the lines thus defined "should constitute and be considered the boundary lines between the said towns, and the territory and jurisdiction on either side of said line as hereby established are accordingly confirmed to said towns respectively." *Held*, that neither the agreement of the towns nor the act of the legislature affected the title of the Commonwealth to the seashore within one of the towns.

Perambulations of the boundaries of towns by the selectmen are no evidence against the Commonwealth of the title to flats within those towns.

Cutting grass nearly every year on flats covered part of the time by the tide does not amount to disseisin.

A right of draining through land cannot be set up in defence to an information by the Commonwealth on the Rev. Sts. c. 108, to assert its title to the land.

The reference of a case by rule of court to an arbitrator to "award and determine the whole cause, including the law and the facts, but subject to the review and final adjudication of all matters of law in the cause by the court," does not make his award conclusive upon the question whether the terms of a grant from the general court, before the ordinance of 1647, passed the title to the soil between high and low water mark. And if the arbitrator reports all the facts with his award in favor of one party, the court may render judgment thereon for the other, without recommitting the award.

INFORMATION of intrusion, filed by the attorney general on the 4th of April 1855, under the Rev. Sts. c. 108, to recover a parcel of flats in the Back Bay in Roxbury, more than one hundred yards below the line of high water mark

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The information averred that the Commonwealth on the 15th of September 1852 "was, and before that time ever had been, the owner in fee of all the lands, channels and flats situated in the Back Bay, in the city of Roxbury, in the county of Norfolk in said commonwealth, lying below the line of riparian proprietorship and southerly of the main dam and avenue of the Boston and Roxbury Mill Corporation; and that said commonwealth now is the owner in fee of all said lands, channels and flats lying within the empty basin in said Back Bay, and within fourteen hundred feet southerly of said dam, and of all said lands, channels and flats within the full basin in said Back Bay;" and "that the city of Roxbury did, on the said fifteenth day of September, and on divers other days within twenty years last past, as well before as after said fifteenth day of said September, and as well before as after said Roxbury was chartered as a city, unlawfully enter and intrude upon said lands, channels and flats, then and now so owned by said commonwealth, for the purpose of unlawfully holding the same against the Commonwealth." And thereupon the information prayed for a summons to the city of Roxbury to appear and answer to this information, "and that such further proceedings may be had in the premises as to law and justice may appertain." The information was afterwards amended by more particularly defining the flats claimed by the Commonwealth.

The city of Roxbury, and the town of West Roxbury, (which had been set off from Roxbury and incorporated as a separate town by St. 1851, c. 250,) severally appeared and pleaded "that they are not guilty of the intrusion wherewith they are charged in said information; and that they did not enter and intrude upon said premises in manner and form as therein is declared;" and filed specifications of the following grounds of defence:

1st. That the premises were not described with sufficient certainty in the information.

2d. That the city of Roxbury and the town of West Roxbury on the day of the suing out of this information and always afterwards owned the premises in fee simple as tenants in common, in the proportions of about five sevenths to said city

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and two sevenths to said town. And the defendants gave notice that for their title they would rely among other things upon the following:

"A. The grant of said premises by the colonial and provincial charters and governments of the Massachusetts Bay to the town of Roxbury.

"B. The confirmation of the aforesaid grant by the Commonwealth of Massachusetts.

"C. The exclusion of the tide water from said empty basin, part of said premises, under authority granted by the Commonwealth of Massachusetts.

"D. The adverse possession of said premises by the said town of Roxbury and by the defendants, taking the crops and exercising ownership over the same, for more than twenty years, in good faith, claiming title, prior to the suing out of said information and prior to September 15th 1852, and prior to the 20th of May 1852.

"E. The incorporation of the town of West Roxbury aforesaid by the Commonwealth of Massachusetts, and the agreement made between said town and the defendants relative to said premises, prior to said information. The defendants will avail themselves of all their rights, waiving nothing.

"F. The natural drainage of a large part of the territory of said original town of Roxbury always has been, and now is, into said Back Bay, and through said channels thereof into Charles River; and these defendants now claim the same right and privilege of drainage, subject only to the lawful obstruction created by the erection of said milldam, which permanently cut off the natural ebb and flow of the tide from said lands, flats and channels of said bay in 1821, but left sluices for the discharge of said drainage, with the waters of Muddy River and Stony Brook, and other smaller streams, into said Charles River."

At February term 1857 this cause was, by rule of court, and with the concurrence of the commissioners on the Back Bay, acting under the authority of the resolve of 1852, *c.* 79, "referred to the arbitration of Hon. Marcus Morton, of Taunton, Massa-

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chusetts, aforesaid; and the referee shall give reasonable notice to the parties of the time and place of hearing; and the hearing shall begin as soon after May 15th 1857 as conveniently may be, and the award shall be returned into court as soon thereafter as practicable; and the pleadings in the cause may be amended, if need be, so as to embrace all the conflicting claims, rights and interests of the parties, within the bounds described in the first resolve of chapter 79 of the resolves of 1852, concerning Boston Harbor and the Back Bay; and the referee may make all needful views of the premises and all reasonable orders for the proper hearing and determination of the cause; and the referee shall report all questions of law arising in the cause to the court for revision and final adjudication; meaning hereby that the referee shall award and determine the whole cause, including the law and the facts, but subject to the review and final adjudication of all matters of law in the cause by the full court."

At the hearing before the arbitrator, the Commonwealth moved to amend the information by inserting before the words "owner in fee" the words "under and by virtue of the charter of the Colony of Massachusetts Bay and the charter of the Province of Massachusetts Bay, in New England, or one of them; meaning to state more fully thereby the nature of the title of the Commonwealth;" by striking out everything relating to any claim of land or flats in the full basin; and by amending the description of the other premises claimed. The arbitrator at this term made the following report:

"The referee appointed by the annexed rule, having duly notified the parties, met them in the State House, on the twenty-second day of June last, and from time to time between that day and the twentieth of October last; and having heard their several pleas, allegations, proofs and arguments, and having duly examined and considered the same, and having viewed the premises, doth now make the following award and report:

"This is an information brought by the attorney general in behalf of the Commonwealth, under the statute of 1836, chapter 108, for the purpose of recovering certain lands and flats in the Back Bay, so called, alleged to be owned by the Commonwealth.

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"The defendants' counsel objected to the sufficiency of the information under the statute, and contended that a prerogative title could not be given in evidence under it.

"The counsel for the Commonwealth offered several amendments, which were objected to by the defendants' counsel.

"But I overruled the objection, and held, that under the circumstances the amendments were admissible, and that under the information, as amended, it was competent for the Commonwealth to give any evidence of title which it might possess.

"The counsel for the Commonwealth contended that the title to the demanded premises, on the first settlement of the country, was vested in the Colony, and thence, by the acts of the several governments, passed through the Province to the Commonwealth.

"This position I adopted, and held that the fee still remained in the Commonwealth, unless its government, or that of one of its predecessors, had aliened it.

"The defendants' counsel then introduced an act of the general court of the Colony of Massachusetts, passed May 25, 1636, in these words: 'Ordered, that all the rest of the ground lying betwixt Dorchester bounds and Boston bounds shall belong to the town of Rocksbury, easterly of Charles River, (except the propriety of the aforesaid town, which they have purchased of particular persons,) Rocksbury not to extend above eight miles in length from their meeting-house.'

"The defendants' counsel contended that this was a grant in fee of all 'the ground' described in it, and that the demanded premises were included in the description.

"I have examined the terms used in this order, considered the usual modes of erecting towns and making grants of land to them, the unsettled state of the country, and the consequent want of accurate knowledge of local objects; and am of opinion that a very liberal rule of construction should be adopted in relation to the grants and other public acts of that day. I am therefore of opinion and decide, that this order was a grant in fee of all the land described in it; that the description covers all the land lying between Dorchester and Boston, as the limits of

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the two towns then existed, which had not before been granted to Roxbury; that inasmuch as every part of the territory granted lay easterly of some parts of Charles River, and southerly of other parts of said river, I cannot believe that the introduction of the words 'easterly of Charles River,' if they apply to the granted new territory rather than the whole town, was intended to divide it, and to grant one part and reserve the other part of the territory, which was included in the general description of the whole. I am therefore of opinion and do decide, that the act of 1636, in the liberal and proper construction of the language used, operated as a grant, and vested in the then town of Roxbury the fee of the demanded premises.

"This view of the case seems to me decisive of its merits, and but for the terms of the rule and the agreement of the parties I should not deem it necessary or proper to proceed any further in my report. But these expressly require 'the referee to report all questions of law arising in the cause to the court for their revision and final adjudication.' But I am directed to award and determine the whole cause, including the law and the facts, subject to the review and final adjudication of all matters of law in the cause by the whole court.

"Gratefully relieved by this provision, I proceed to report all the points raised by the counsel on either side, without giving an opinion upon their materiality or relevancy.

"It was contended by the defendants' counsel, that the exclusion of the tide water from the empty basin, by virtue of the act incorporating the Boston and Roxbury Mill Corporation, passed June 14th 1814, and the subsequent acts of legislation touching that subject, vested in the adjoining owners all the land thus made bare, or at any rate operated as a relinquishment of all the rights of the Commonwealth, and barred it from making any claim to the same.

"But I was of opinion and held, that neither the act of 1814, and the proceeding under it, nor any other acts of the government, divested the Commonwealth of any right or title which it had or might have to the premises in litigation.

"The defendants' counsel contended that the demanded prem-

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ises, being admitted by the allegations in the information to be within the bounds of Roxbury, were, by virtue of the original settlement of the town and the act of 1836, necessarily the property of the town.

"But as the premises might be within the jurisdictional limits of the town, and not its property, I was of opinion and held, that the allegation was not proof of title in Roxbury, nor did it preclude or estop the Commonwealth from setting up and maintaining any title it might have to the premises.

"The defendants' counsel further contended that the bounds between the two cities, agreed upon by Boston and Roxbury, in 1823, and afterwards, viz., in 1836, established and confirmed by the legislature, and from the time of said agreement till the commencement of this suit acquiesced in and recognized by every body, must be presumed and held to be the bounds established by the colonial act of 1636.

"On this point I had doubts. But inasmuch as this line was agreed upon by parties who had no power to bind the Commonwealth, or in any way to affect its title, and inasmuch as the act of the Commonwealth in confirming and establishing this line may be supposed to look rather to jurisdictional bounds than to the title of the lands, and inasmuch as this was a conventional line, though intended to be based on the original line of 1636, yet avowedly departed from it in many particulars, I was of opinion and held, that though these several circumstances furnished strong evidence that the premises were included within the grant of 1636, yet they do not furnish conclusive evidence that such was the case.

"The defendants' counsel also contended that the act of 1836, chapter 37, by its true construction, not only establishes the jurisdictional bounds between Boston and Roxbury, but establishes the title to the land in question in Roxbury, so far at least as to preclude and estop the Commonwealth from setting up a claim to the premises.

"But I was of opinion, though it was strong evidence of the construction of the grant of 1636, which I have adopted, yet it was not of itself to establish a title in Roxbury, if they had none

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before. But I held, that that establishment of this line was a valid substitution of the conventional line for the original line, so that if Roxbury established her title under the act of 1636 she will hold and recover up to this straight line instead of the original crooked line.

"Much evidence was introduced to show possession in Roxbury, and acquiescence in all others. All the evidence on this point is fully reported, and will be herewith presented to the court for their consideration. In my opinion it did not prove that continuous and exclusive possession of the whole premises which is necessary to establish a title by disseisin.

"The defendants, in their answer, set up a claim to a right of drainage in the natural channels running through the demanded premises.

"But I was of opinion and held, that this question did not properly arise, and could not be tried in this suit. I was also of opinion, no evidence was offered which could sustain the claim, even if it came properly before this reference.

"All the evidence offered on either side was admitted, subject to the opinion of the whole court on its admissibility and relevancy.

"Having duly considered the whole case, and all the several grounds taken and urged by the counsel on both sides, and given my opinion on the same as before stated, do now report and decide and award, that the defendants have established their title to the fee of the demanded premises as described in the attorney general's information, and therefore that the Commonwealth take nothing by its information aforesaid, and the costs be taxed according to law."

The arbitrator returned with his award a list of the charters, laws and records, principally relied on at the hearing, and a full report of the evidence introduced before him.

The maps used at the hearing were the following: "The South Part of New England as it is Planted this yeare 1634," in Wood's New England Prospect, London 1634, copied in Young's Mass. Chron. 389, and in 1 Palfrey's Hist. New England, 360. Des Barres Map of Boston Harbor, 1775.

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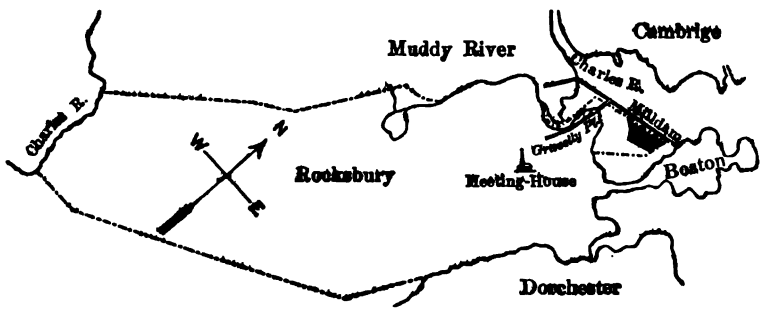
Mather Withington's plan of Roxbury in 1794. Hale's Map of Boston in 1820. Maps of Boston, Roxbury, Dorchester, Brookline, Dedham and Cambridge, made under the resolve of 1829 c. 50. Shedd's Map of the Vicinity of Boston in 1853.

In the following plan, the shaded part denotes the flats in dispute, and the only modern lines are those of the Milldam and the boundary of Roxbury upon the flats. The other lines and bounds approximately represent the location of the grant of 1636 upon a scale of two and a half miles to the inch.



The following laws and records were referred to: The Colony Charter, granting territory, including the premises in question, to the Governor and Company of the Massachusetts Bay. 1 Mass. Col. Rec. 3.* Anc. Chart. 5. The orders made by the Company in England in 1629, and by the general court in 1638, for the allotment of lands in the Colony. 1 Mass. Col. Rec. 34, 39, 43, 64, 68, 363, 399, 405; 225, 240. Anc. Chart. 709–711. The order of the court of assistants in 1630, taxing Roxbury and other plantations for the support of military officers.† The early orders of the general court as to the making, surveying and recording of grants of lands, and the powers and

* The references, when not stated to be to the original records, are to the edition printed for the Commonwealth.

† September 28th 1630. "It is ordered, that there shalbe collected and levied by distresse out of the severall plantations, for the maintenance of Mr. Patricke & Mr. Vnderhill, the some of 50*l.*, vizt: out of Charlton, 7*l.*; Boston, 11*l.*; Dorchester, 7*l.*; Rocsbury, 8*l.*; Waterton, 11*l.*; Meadford, 3*l.*; Salem, 3*l.*; Wessaguscus, 2*l.*; Natascott, 1*l.*" 1 Mass. Col. Rec. 77.

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bounds of towns, which are copied in the margin.* The orders,

* April 1st 1634, affirmed March 4th 1634–5. Order for the survey and recording by "the constable and four or more of the chief inhabitants of every towne (to be chosen by all the free men there att some meeting there) with the advice of some one or more of the next assistants," of all lands "improved or enclosed or graunted by speciall order of the court." 1 Mass. Col. Rec. 116, 137. Anc. Chart. 41.

May 14th 1634. "That none but the Generall Court hath power to rayse moneys and taxes, and to dispose of lands, viz. to give and confirme proprietyes." 1 Mass. Col. Rec. 117.

September 3d 1634. Order for the pay of the "nyne comittees appoyncted to sett out the bounds of townes." 1 Mass. Col. Rec. 127. [See Ib. 125.]

March 3d 1635–6. "Whereas particular townes have many things which concerne onely themselves and the ordering of their owne affaires, and disposeing of businesses in their owne towne, it is therefore ordered, that the freemen of every towne, or the major parte of them, shall onely have power to dispose of their owne lands, and woods, with all the previlidges and appurtenances of the said townes, to graunt lotts, and make such orders as may concerne the well ordering of their owne townes, not repugnant to the lawes and orders here established by the Generall Court; as also to lay mulks and penaltyes for the breach of their orders, and to levy and distreine the same, not exceeding the some of xxs.; also to chuse their own particular officers, as constables, surveyors for the highwayes, and the like; and because much business is like to ensue to the constables of severall townes, by reason they are to make distresses, and gather fynes, therefore that every towne shall have two constables, where there is neede, that soe their office may not be a burthen unto them, and they may attend more carefully upon the discharge of their office, for which they shalbe lyeable to give their accompts to this court when they shalbe called thereunto." 1 Mass. Col. Rec. 172. Anc. Chart. 195.

September 9th 1639. "Item. To record all men's houses and lands, being certified under the hands of the men of every towne deputed for the ordering of their affaires." 1 Mass. Col. Rec. 276. Anc. Chart. 43.

June 3d 1641. "It is ordered, that every towne should sett out their bounds within twelve months after their bounds are graunted." 1 Mass. Col. Rec. 319.

November 11th 1647. Ordered, "that every towne shall set out their bounds within a twelve month after their bounds are granted, and that when their bounds are once set out, once in three yeares, 3 or more persons of a towne, appointed by the selectmen, shall appoint with the adjacent townes to go the bounds betwixt their said townes and renew their marks, which marks shalbe a greate heape of stones or a trench, of six foote long two foote broade, the most ancient towne to give notice of the time and place of meeting for perambulation which shalbe in the first or second month." 2 Mass. Col. Rec. 210. Anc. Chart. 53.

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copied in the margin,* concerning the bounds of Boston, Rox-

* November 7th 1632. "Capt. Trask, Mr. Conant, William Cheesebrough and John Perkins are appoiacted by the court to sett downe the bounds betwixte Dorchester and Rocksbury. Ralfe Sprage is chosen umpire." 1 Mass. Col. Rec. 102.

March 4th 1632–3. "It is agreed, that the bounds formerly sett out betwixte Boston and Rocksbury shall continue, onely Rocksbury to enjoy the conveniency of the creeke neere thereunto." 1 Mass. Col. Rec. 103.

August 6th 1633. "It is agreed that there shalbe a sufficient cartbridge made in some convenient place over Muddy River, and another over Stony Ryver, to be done att the charge of Boston and Rocksbury." 1 Mass. Col. Rec. 107.

March 4th 1633–4. A committee "appoyncted to sett out the bounds betwixte Boston and Rocksbury, which is nowe in difference betwixte them." 1 Mass. Col. Rec. 113.

September 25th 1634. "It is ordered, that the ground aboute Muddy Ryver, belonging to Boston, and used by the inhabitants thereof, shall hereafter belonge to Newe Towne, the wood and timber thereof groweinge and to be groweinge to be reserved to the inhabitants of Boston, provided, & it is the meaneing of the court, that if Mr. Hooker and the congregation nowe setled here shall remove hence, that then the aforesaid meadowe ground shall return to Waterton, and the ground att Muddy Ryver to Boston." 1 Mass. Col. Rec. 129, 130.

September 25th 1634. "It is ordered, that Boston shall have inlargement att Mount Woolliston and Rumney Marshe." 1 Mass. Col. Rec. 130.

March 4th 1634–5. "It is ordered, that the bounds of ground betwixte Newe Towne and Rocksbury, aboute Muddy Ryver, & soe upp into the country, shalbe sett out by Ensigne Jennison, before the nexte court of assistants, under the penalty of vl." 1 Mass. Col. Rec. 142.

April 7th 1635. Said Jennison's report that "the lyne betwixte Rocksbury and Newe Towne is layde out to run south west from Muddy Ryver, neere that place which is called Mr. Nowell's bridge, a tree being marked on foure sydes, and from the mouthe of the ryver to that place: the south side is for Rocksbury, and the north syde for Newe Towne." 1 Mass. Col. Rec. 144.

September 3d 1635. "It is ordered that there shalbe a plantation setled, about two myles above the falls of Charles Ryver, on the north east syde thereof, to have ground lyeing to it on both sydes the ryver, both upland and meadowe, to be layd out hereafter, as the court shall appoynct." 1 Mass. Col. Rec. 156.

September 3d 1635. "Ordered, that the bounds of Rocksbury, on both sydes the towne, shalbe vewed, and a plott thereof drawne, and soe returned into the nexte Generall Court. Ensigne Jennison and Mr. Aspinwall are appoyncted to doe it." 1 Mass. Col. Rec. 159.

March 3d 1635–6. "Agreed, that Newe Towne bounds shall run 8 myles into the country from their meeteing howse." 1 Mass. Col. Rec. 166.

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bury, Dorchester, Dedham, and Newtowne (afterwards Cam-

March 3d 1635–6. "Ensigne Jennison, Mr. Danforth and Mr. William Spencer are deputed a committee to set out the bounds of the newe plantation above Charles Ryver, against all other townes that joynes upon it, and each towne is permitted to send one of their members to accompany them; also they are to vewe the meadowe about the Blue Hills, and to informe the next General Court to what towne it may most conveniently be layde." 1 Mass. Col. Rec. 166, 167.

March 3d 1635–6. "Ordered, that the bounds of Waterton shall run eight myles into the country from their meeteing howse, within the lynes already sett out; and it is agreed that Sir Richard Saltonstall shall have one hundred acres of the meadowe, to be sett out indifferently by John Pratt and William Rescue." 1 Mass. Col. Rec. 167.

March 3d 1635–6. "With the consent of the deputies of Dorchester & Rocksbury, it is referd to Capt. Traske, Mr. Palmer, & William Cheesebrough, or any two of them, to sett out the bounds betwixte Rocksbury and Dorchester, which they are appoynoted to doe before midsummer nexte." 1 Mass. Col. Rec. 167.

March 3d 1635–6. "Ordered, that the land formerly graunted to Mr. Mathew Cradocke, merchant, shall extend a mile into the country from the ryver syde in all places.

"Ordered, that Charles Towne bounds shall run eight myles into the country from their meeteing howse, if noe other bounds intercept, reserveing the proprietie of fermes graunted to John Winthrop, Esqr., Mr. Nowell, Mr. Cradocke, and Mr. Wilson, to the owners thereof, as also free ingresse and egresse for the servants and cattell of the said gentlemen, and common for their cattell, on the backeside of Mr. Cradock's ferme." 1 Mass. Col. Rec. 168.

March 28th 1636. "The bounds of Dorchester is to run from the outside of Mr. Rossiter's ferme, nexte the sea, to the foote of the greate hill, from a marked tree to a second marked tree, in a straight lyne to the topp of the Blue Hills, nexte Naponsett, southe weste and by weste halfe a poynte westerly, and all the marshe ground from the south east syde of Mr. Newberry's howse, alonge Naponsett Ryver, to Mr. Stoughton's myll, to lye to Dorchester, and all the rest of the upland & marshe from Mr. Rossiter's ferme to the sea, and soe to the mouthe of the ryver beyonde Minotiquid Ryver, running into countrie southward and to the west, to lye to Boston, onely excepting such land as they have right to by graunt of the court formerly. Robte Feke. John Talcott." 1 Mass. Col. Rec. 182.

April 13th 1636. "The 13th of the 2d Month 1636. Wee, whose names are underwritten, being appointed by the Generall Court to set out the bounds of the newe towne upon Charles Ryver, do agree that the bounds of the towne shall run from the markt tree by Charles Ryver on the north west side of Roxberry bounds, one mile & halfe north east, & from thence three miles north west, & so from thence five miles southe weste, & on the south west side Charles Ryver from the

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bridge, and since, in part, Brighton). Among the grants of the

south east side of Roxberry bounds, to run four miles on a south west line, reserving the proprieties to severall persons granted by speciall order of court. William Spencer. Nicholas Danforth. William Jennison." 1 Mass. Col. Rec. 173; (MS.) 175.

April 13th 1636. A second certificate of the same persons, "being appointed by the court to veiw the medow ground by Naponset Ryver, near the Blue Hills, and returne into the next court what towne it may best belong unto," by which they divide that meadow between Dorchester and "that part of Mount Wollaston which belongs to Boston, provided no man's propriety, unless by speciall order of courte, hinder the same. The court reserving power to set downe the extent." 1 Mass. Col. Rec. 173; (MS.) 175.

April 13th 1636 (recorded May 25th 1636). "Ordered, that all the rest of the ground lying betwixte Dorchester bounds and Boston bounds, shall belonge to the towne of Rocksbury easterly of Charles Ryver, (except the proprvety of the aforesaid towne, which they have purchased of particular persons, Rocksbury not to extend above eight myles in lenght from their meeteing howse.

"This order should have been entred nexte to the second order of the last leafe, dated 13 of the second moneth 1636." 1 Mass. Col. Rec. 176; (MS.) 177, from which this is printed.

September 8th 1636. "Ordered that the name of the plantation to bee setled above the falls of Charles Ryver is to bee Deddam, to enjoy all that land on the southerly and easterly side of Charles Ryver not formerly graunted to any towne or particular persons, and also to have five miles square on the other side of the ryver." 1 Mass. Col. Rec. 179, 180.

September 8th 1636. A committee "deputed to measure and set out the bounds of Roxberry and such farmes as lyes near adjoyning to the aforesaid plantation." 1 Mass. Col. Rec. 180.

November 15th 1637. A committee "appointed to set out the purchased land belonging to Dedham." And another "to set out the bounds between Dedham and Dorchester." 1 Mass. Col. Rec. 208, 209.

November 20th 1637. "Mount Woollaston is to be bounded by the Blew Hills, and the rest is to bee to Dorchester, to go to the bounds of Plimouth." 1 Mass. Col. Rec. 217.

May 2d 1638. "It is ordered that Newetowne shall henceforward be called Cambrige." 1 Mass. Col. Rec. 228.

May 16th 1638. A committee "appointed by this court to rectify the bounds betweene Roxberry & Dedham, (together with the lands purchased by Dedham,) have fully agreed concerning them by drawing an equall line of division by marked trees and stakes, which is corrected from the southeast side of Roxberry bounds by a streight northwest line running till it touch upon Charles Ryver Furthermore, in consideration of some straightnes at the westermost end of Rox-

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general court of the Colony, and as evidence of the theory of the

berry bounds, by reason of the course of the river, it is mutually agreed, that a portion of medow shall belong unto Roxberry, which joyneth towards the northeast upon Roxberry, and is bounded towards the southeast by certeine marked trees from the line of division aforesaid, (comprehending a narrow slip of upland,) unto a point of upland on the brows of the marsh, and from thence by the northermost point of a little hillock of upland in the marsh straight on to the ryver." 1 Mass. Col. Rec. 230, 231.

May 16th 1638. A similar report, establishing the bounds between Dedham and Dorchester, by "striking the head line of Dorchester from a marked tree by a fresh brooke (now commonly called Huggins Brooke) to a certeine stake of upon Dorchester plaine towards the top of the Great Blew Hill," and thence southwesterly to "Plimouth bounds." 1 Mass. Col. Rec. 231.

January 20th 1639–40. A committee "having full authority, from the townes wherein wee dwell, to end all controversyes concerning the line of partition betweene Boston and Rocksbury at Muddy River, concerning which some doubt hath beene made, have agreed that the trees, as farre as they have beene marked by Capt. Jennison, shall stand for parting limits betweene both townes, and from thence to run to the corner of Dedham lands next adjoyning." And another report settling the bounds between Boston and Cambridge. 112 Mass. Archives, fol. 4. 1 Mass. Col. Rec. 341, 342.

June 14th 1642. Daniell Fairefeild sentenced, among other things, to be "confined to Boston neck, so as if hee bee found at any time dureing his life to go out of Boston neck, that is, beyond the railes toward Roxberry, or beyond the low water marke, hee shalbee put to death upon due conviction thereof." 2 Mass Col. Rec. 13.

May 10th 1643. "The whole plantation within this jurisdiction is divided into four sheires, to wit, Essex — Salem, Linn," &c. "Middlesex — Charlestowne, Cambridge, Watertowne," &c. "Suffolk — Boston, Roxberry, Dorchester, Dedham," &c. "Norfolk— Salsberry, Hampton, Haverill," &c. 2 Mass. Col. Rec. 38.

October 17th 1643. "Dedham hath 3 weeks further time granted them to settle their bounds." A new committee appointed "to lay out the land of Roxberry men; and Capt. Keayne should have his 400 acres there layd out by the same men, if it bee there to bee had near Dedham and Watertowne." 2 Mass. Col. Rec. 50.

May 12th 1675. A committee appointed October 7th 1674 "to heare the difference betwixt Roxbury and Dedham concerning a line betwixt the two townes," report thus: "Wee, having heard theire allegations and perused the evidences, finde that Roxbury had once a right and title unto the line which they claime; but by evidence and agreement wee finde the two townes of Roxbury and Dedham have made an agreement of another line, which was runne by both tounes in the yeares 1651 & 1654, to be the line of division betwixt the

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shore lines of towns, the parties referred to the orders of 1637 and 1640, about Noddle's Island,* and of 1641, 1647 and 1649, about the title to the sea shore between high and low water mark.† The defendants also referred to the acts of 1651 and

two tounes; but if any of Roxbury have any propriety within the said line towards Dedham, they shall enjoy their particcular propriety, and Dedham enjoy their purchased land purchast of Roxbury." And their report is accepted. 5 Mass. Col. Rec. 25, 37, 38.

* March 9th 1636–7. "Nodles Iland is layd to Boston." 1 Mass. Col. Rec. 189.

May 13th 1640. "It is declared, that the flats round about Nodles Iland do belong to Nodles Iland to the ordinary lowe water marke." 1 Mass. Col. Rec. 291.

† Ordinance of 1641. "Every inhabitant that is an howse holder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farre as the sea ebbes and flowes within the presincts of the towne where they dwell, unlesse the free men of the same towne or the Generall Court have otherwise appropriated them; provided that this shall not be extended to give leave to any man to come upon others proprietie without there leave." Body of Liberties, art. 16, 28 Mass. Hist. Coll. 219.

Amended in 1647 thus: "The which clearly to determine; It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor or the land adjoyning shall have propriety to the low water mark, where the sea doth not ebbe above a hundred rods, and not more wheresoever it ebbs further: provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands." Mass. Col. Laws, (ed. 1660) 50; (ed. 1672) 90, 91; Anc. Chart. 148, 149.

Resolve of October 1649. "The inhabitants of a towne within this jurisdiction, at their first siting downe, did generally agree to set apart a certeine parcell of land, to the value of about 20 acres, lying between the salt marsh and the low water marke, for the use of the whole towne, to be improved for thatching houses, the want whereof is very prejuditiall to the towne, since which time this honored Generall Courte, by an order of theirs, have made all the lands to low water marke to be the proprietors of the land joyning thereunto [or "to belong to the proprietors of the land adjoyning thereunto"]. The aforesaid inhabitants, not being able to resolve themselves, humbly desire the resolution of this honnoured court, whether the order of the court make void the preceding toune order. The court doth conceive the court's order doth not disannul the order of the toune, preceding it." 2 Mass. Col. Rec. 284. ["In answer to the tounes quaery, the resolution of the courte is, that the courte order doth not disannull the order of the towne preceding it. By both." 3 Mass. Col. Rec. 181.]

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1685, "for the prevention of quæstions and suits at law that might arise upon deeds of houses and lands, wherein the word heire * is omitted," requiring words of limitation to pass an estate of inheritance, except in grants from towns; 4 Mass. Col. Rec. pt. I. 39; 5 Mass. Col. Rec. 470; and the act of May 1672, making continuous possession of land a good title. 4 Mass. Col. Rec. pt. II. 515. [3 Mass. Col. Rec. 422. Mass. Col. Laws, (ed. 1672,) 124. Anc. Chart. 175.]

The Province Charter of 1691, after reciting the Plymouth and Massachusetts Colony Charters, and defining the bounds of the Province, granted its territory to the inhabitants thereof; and did "grant and ordain that all and every such lands, tenements and hereditaments, and all other estates, which any person or persons or bodies politick or corporate, towns, villages, colleges or schools, do hold or enjoy, or ought to hold and enjoy, within the bounds aforesaid, by or under any grant or estate duly made or granted by any general court formerly held, or by virtue of the letters patent herein before recited, or by any other lawful right or title whatsoever, shall be by such person and persons, bodies politick and corporate, towns, villages, colleges or schools, their respective heirs, successors and assigns for ever hereafter held and enjoyed, according to the purport and intent of such respective grant, under and subject nevertheless to the rents and services thereby reserved or made payable, any matter or thing whatsoever to the contrary notwithstanding." Anc. Chart. 25, 26, 27. By *St.* 4 W. & M. (1692) it was enacted that "the bounds of all townships shall be and continue as heretofore granted and settled respectively, and shall be run betwixt town and town and marks renewed once in three years by two of the selectmen of each town," &c. Anc. Chart. 247. The order of the general court of November 13th 1705, incorporating the inhabitants of Muddy River as a town by the name of Brooklyn, is copied in the margin.†

* 5 Mass. Col. Rec. (MS.) 472. Mass. Col. Laws, (ed. 1672,) p. 32. Not "house," as printed in the Commonwealth's edition of the Massachusetts Colony Records.

† November 13th 1705. In Council. "The order passed by the Represen-

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Stephen P. Fuller testified that the distance from the meeting-house in Roxbury (which stands on the site of the first meeting-house in that town) to the westerly line of the town was between seven and eight miles.

The defendants gave in evidence before the arbitrator extracts from the Roxbury Book of Possessions, and records of grants by that town, some of which included a few acres of salt marsh "lying at" or "neare Gravelly Poynt," and "butting upon the sea" on the north or west; settlements of the lines between Roxbury and Newton, Dorchester, Dedham and Boston, 1679–1699; perambulations of the boundaries of Roxbury by the selectmen from 1708 to 1851; and an indenture between the town of Roxbury and David Sears, dated November 15th 1832, containing mutual releases of claims to flats on each side of a certain line, and by which Sears released to said town his claim to the demanded premises; none of which need be particularly stated.

The defendants also relied on the *Sts.* of 1814, *c.* 39, incorporating the Boston and Roxbury Mill Corporation, with authority to erect a solid dam from Boston to Brookline, so as effectually to exclude the tide water from the premises described in the information; and 1822, *c.* 34, authorizing the widening of this dam; the resolve of 1823, *c.* 49, authorizing that corporation to occupy and use certain flats on the northerly side of its dam; the *St.* of 1824, *c.* 26, incorporating the Boston Water Power Company, with authority to "purchase and hold any

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tatives upon the petition of the Inhabitants of Muddy River, a Hamlet of Boston, read on Saturday last, viz: Ordered that the prayer of the petition be granted, and the powers and privileges of a township be given to the Inhabitants of the land commonly known by the name of Muddy River, the town to be called Brooklyn, who are hereby enjoyned to build a meeting house and obtain an able orthodox minister according to the direction of the law to be settled among them within the space of three years next coming: Provided that all common lands belonging to the town of Boston lying within the bounds of the said Muddy River not disposed of or allotted out shall still remain to the Proprietors of the said lands: Which order being read again was concurred. And is consented to. J. Dudley." 3 General Court Rec. 167

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quantity of the water power created by the establishment of the dams between Boston and Roxbury, or any lands contiguous to said dams or within the limits of the basins created therewith or either of them," saving the rights of the city of Boston or any of the adjacent towns as they then existed; an indenture dated May 9th 1832, by which the Boston and Roxbury Mill Corporation conveyed to the Boston Water Power Company all its rights in the land in the empty basin, together with all the tide water mill power; the resolve of 1852, *c.* 79, authorizing the abandonment of the tide mill power and the filling up of the Back Bay; indentures between the Boston Water Power Company and the Boston and Roxbury Mill Corporation respectively and the Commonwealth, dated June 9th 1854, and December 30th 1856, releasing and granting away said mill power and allowing the empty basin to be filled up, and making the mill-dam a perpetual highway; and an indenture, dated December 11th 1856, between the Boston Water Power Company, the city of Boston and the Commonwealth, undertaking to control the drainage of Roxbury through the empty basin.

The defendants also put in evidence the report of a committee of the mayor and aldermen of Boston, respecting the boundary line between Boston and Roxbury, which was duly accepted by the mayor and aldermen of Boston and by the selectmen and the town of Roxbury in 1823,* and a petition of the mayor and

* "Monday April 28th 1823. At a meeting of the mayor and aldermen held this day, the committee appointed to confer with the selectmen of Roxbury respecting the boundary line, and to fix the same between that town and Boston, reported as follows:

"The undersigned having been directed to confer with the selectmen of Roxbury respecting the boundary line, and to fix the same between that town and Boston, which passes through the empty basin (so called) of the Boston and Roxbury Mill Corporation, he has attended to that service, and submits the following report, viz:

"By the erection of the empty basin above mentioned, the most of the waters, of course, which once occupied that space, have been excluded, some of the channels diverted from their original course, and thereby, for a very considerable distance, the natural boundary has become almost obliterated. The parties have agreed, therefore, that the following shall hereafter constitute and be considered

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aldermen of Boston and the selectmen of Roxbury to the legislature in 1836,* both of which are copied in the margin. And they relied upon the St. of 1836, c. 37, by which the lines so defined, "which have been mutually agreed upon between the

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the boundary line in the section to which they refer, between Boston and Roxbury, viz: beginning at a stake driven on the southeasterly side of the dyke, which forms the southwesterly boundary of said basin, from which point the centre of the steeple of Park Street Meeting-house in Boston bears north 53° (say fifty three degrees) east. The line to run in this direction from the point first mentioned about two hundred and ninety rods, until it strikes the centre of the main channel (which yet remains) westerly of the rope walks in said Boston, and thence northerly in the centre of said channel about one hundred and twenty five rods to a point two hundred feet distance southerly from the main branch of the Milldam or Western Avenue. The boundary line of said Roxbury thence turning nearly at right angles, and running westerly nearly on a parallel line with said Milldam until it strikes the branch thereof which leads to Roxbury, at which point a stone monument has been erected. The undersigned has agreed with the selectmen of Roxbury that permanent monuments to mark the boundaries agreed upon shall be erected; one at the first mentioned or starting point upon the dyke; and one at the termination of the first direction in the centre of the channel aforesaid.

"In running this line in the first direction, it will be seen by reference to the map that some deviations from the original or natural boundary and some exchanges of territory are involved, and consequently, it is supposed that the sanction of the legislature will be necessary to render valid the arrangement agreed to, and it is proposed that the same shall be obtained at the next session of the General Court. Joseph Jenkins."

* "To the Honorable the Senate and House of Representatives in General Court assembled:

"The mayor and aldermen of the city of Boston and the selectmen of the town of Roxbury respectively represent that the original lines dividing the territory of the said city from the territory of said town, lying between Boston Neck and the Boston and Roxbury Milldam, are crooked and inconveniently irregular, and that said corporations, to remedy the same, by their agents for this purpose duly authorized, have mutually agreed to straighten said lines, and have run the same and erected stone monuments to the acceptance of the said corporations respectively, as set in the copies of their proceedings and the plan hereto annexed.

"Wherefore the said corporations pray, that said new line so agreed on may be established and confirmed as the true line between said corporations, and as bounds, &c."

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city of Boston and town of Roxbury, shall hereafter constitute and be considered the boundary lines in the section to which they refer, between the said city and said town;" "and the territory and jurisdiction on either side of said lines as hereby established are accordingly confirmed to said city and said town respectively."

The defendants also introduced testimony that the demanded premises and other flats in the empty basin were always known as Roxbury Flats; and that after the water was excluded by the milldam, the grass spread gradually over the flats, and part of it was cut and sold by Sears in 1824, and by the town of Roxbury "within a year or two of 1825" and nearly every year from 1831 to 1853, and was never cut by any one else.

Upon the return of the arbitrator's award and report, each party moved for judgment thereon in its own favor.

This case was argued at Boston at March term, 1858.

S. Bartlett, (*T. B. Hall* with him,) for the Commonwealth. 1. The information, as amended, sufficiently sets forth "the title and claim of the Commonwealth," as required by the Rev. Sts. *c.* 108, § 1. It would seem that the title of the Commonwealth is a fee by record and grant under the Plymouth Company, and not *jure coronæ* by the feudal prerogative title, which ascribes to the king all domain not shown to have been granted; and if this is so, an allegation of title and claim by prerogative could not be sustained. Mass. Col. Charter, Anc. Chart. 1–6. 2 Bl. Com. 51, 53. *Attorney General* v. *Chambers*, 4 DeGex, Macn. & Gord. 206. *Commonwealth* v. *Alger*, 7 Cush. 58, 65, 66. *Commonwealth* v. *Charlestown*, 1 Pick. 180, 183. But if the title of the seashore and *fundus maris* to the extent of the marine league can only be by prerogative, then the information shows the demanded premises to fall within it, both by the description, and by the averment that the title is in the Commonwealth under the Colony and Province Charters.

2. The description of the premises in the information as "lands, channels and flats situated in the Back Bay in the town of Roxbury," if relied upon by the defendants as conclusive

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against the right of the Commonwealth, should have been taken advantage of by demurrer. But it is merely descriptive of municipal jurisdiction.

3. By the terms of the submission and award all questions of law are expressly reserved for the determination of this court. The question of the construction of the grant of 1636, as applied to the circumstances of the place and time, is a question of law.

4. It is settled by the decisions in England and in this commonwealth that the shores of the sea and the ground and soil of the coast belonged by prerogative to the king, and vested in the government of the Colony, Province and Commonwealth of Massachusetts. *Attorney General* v. *London*, 8 Beav. 270; 1 H. L. Cas. 440; 12 Beav. 8, 171; 2 Macn. & Gord. 247. *Attorney General* v. *Chambers*, 4 DeGex, Macn. & Gord. 206. *Benest* v. *Pipon*, 1 Knapp, 60. *In re Hull & Selby Railway*, 5 M. & W. 327. 45 Law Mag. 70. 3 Law Mag. & Rev. 128. *Commonwealth* v. *Alger*, 7 Cush. 53. *Commonwealth* v. *Charlestown*, 1 Pick. 180. Orders of 1640–1649, *ante*, 465, note.

5. The arbitrator's construction of the order of the general court of the Colony in 1636 was erroneous. If the words "easterly of Charles River" are to be treated as a boundary on the lower part of that river, which was an arm of the sea, they would be limited by the principles of law, before the ordinance of 1647, to high water mark. And the other two abuttals, "Boston bounds" and "Dorchester bounds," must be presumed, until the contrary is shown, to be limited by the shore.

But the words "easterly of Charles River" must be referred, not to the arm of the sea called the Back Bay, (from which the premises granted lay southerly, not easterly,) but to that line of Charles River, which then formed the whole westerly boundary of Roxbury; Brookline (then Boston) extending to that part of the river on one side and Dorchester on the other side. Orders of 1633–1640 in Mass. Col. Rec.; *ante*, 461–464, note. [See plan, *ante*, 459.] Besides; the grant of 1636 is obviously of land extending into the interior, according to the usual mode of enlarging grants at that period. 1 Mass. Col. Rec. 166, 168, 176; *ante*, 461, 462, 463, note. The coast had been previously

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granted to Roxbury, and the bounds there defined. 1 Mass. Col. Rec. 103, 159; *ante*, 461, note.

If the grant was not limited by the shore, but extended over the bottom of the sea, it must extend as far seaward as its abuttals, Boston bounds and Dorchester bounds, of the extent of which the defendants produce no proof. But the Boston line is shown to have stopped originally with the shore by a long series of legislative acts granting liberties to Boston, and leave to littoral proprietors to extend wharves. If this grant was of the *fundus maris* in 1636, then the ordinance of 1647 had no application to the shore of Roxbury, and the rights of littoral proprietors under grants from that town may not have the common construction.

6. The acts of the town of Roxbury, as shown by its records and the perambulations of its officers, made many years after the alleged grant, and the agreements between the town of Roxbury and individuals, are inadmissible to disprove the title of the Commonwealth.

7. The acts of the legislature, incorporating the Boston and Roxbury Mill Corporation, and excluding the tide water from the empty basin, and inclosing it in the full basin, gave no title to Roxbury. And there is no principle upon which they can be deemed an abandonment of the title in the soil to the littoral proprietors.

8. The agreement of 1823 between Boston and Roxbury, for straightening their boundary line, upon its face had reference to municipal jurisdiction only, and depended on legislative sanction.

9. So the petition to the legislature in 1836 relates only to straightening the lines "dividing the territory of said city from the territory of said town." The *St.* of 1836, *c.* 37, passed upon this petition, copies from this agreement the word "territory," and adds the word "jurisdiction" to make the meaning certain. *Ante*, 468. The word "territory," as used in establishing boundary lines between towns or counties, means jurisdiction, not title. Prov. St. 13 G. 3, (1773,) Anc. Chart. 678, 679. *Sts.* 1785, *c.* 11; 1792, *c.* 72; 1794, *c.* 31; 1833, *c.* 15; 1836, *c.* 193; 1837, *cc.* 42, 83; 1840, *c.* 36. Rev. Sts. *c.* 14.

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10. The acts relied on to prove disseisin were transitory and not in continuous years, and covered but a small part of the territory; and were inadmissible to prove a disseisin. *Slater* v. *Jepherson*, 6 Cush. 129. This is a question of fact, and has been disposed of as such by the arbitrator. And before the Rev. Sts. *c.* 119, § 12, the Commonwealth could not be disseised, and twenty years had not elapsed since that before this information was filed. See also *St.* 1852, *c.* 253.

11. The defendants' specification of the right of drainage is a special disclaimer, and thus of itself a waiver of the general issue, and an admission of the plaintiff's title. Jackson on Real Actions, 100, 101. The *St.* of 1852, *c.* 312, does not affect the form of proceeding upon informations on the Rev. Sts. *c.* 108. Dwarris on Sts. (2d ed.) 523. Under any system of pleading, such easement, if it exists, is no defence to a recovery by the Commonwealth of both fee and possession, subject to it; but leaves the protection of such easement, if interfered with, to action on the case or bill in equity.

If this right ever existed, it was cut off by building the mill-dam, under statutes which provided an indemnity. *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467. And the referee finds that even if this question came properly before him, there was no evidence which could sustain the claim.

12. The arbitrator, having reported all the facts, the court, after revising his decision in matter of law, should render judgment for the Commonwealth without recommitting the case.

R. Fletcher & J. Giles, (*W. Gaston* with them,) for the defendants. 1. The information does not set forth the title of the Commonwealth to the premises claimed as is required by the Rev. Sts. *c.* 108, §§ 1, 2. This defect is substantial, and is not cured by the pleadings. *Attorney General* v. *London*, 2 Macn. & Gord. 247. The Commonwealth cannot under this information set up a prerogative title to the premises.

2. The premises claimed and described, being, as alleged in the information, within the bounds of Roxbury, were acquired in fee by the original town of Roxbury, by settlement in 1630,

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and subsequent grant of town bounds; it appearing that Roxbury has always owned, in its corporate capacity, all the lands within its bounds, not belonging to individuals.

3. The arbitrator having decided, as matter of law, (which was also expressly admitted by the counsel for the Commonwealth at the hearing before the arbitrator, and is therefore not subject to review,) that the act of 1636 was a grant in fee of all the land described in it; and the arbitrator having also found by the evidence and view, and decided, as matter of fact, that the demanded premises were embraced within the descriptive bounds of that grant; the award is decisive of the case, and conclusive upon the parties, under the submission. See submission and award, *ante*, 454, 455, 456.

4. By the common law of Massachusetts, the Commonwealth has jurisdiction and dominion of the seashore and the land where the tide ebbs and flows below one hundred rods from high water mark, for public uses only; but does not own and has no exclusive right to the soil as private property. Angell on Tide Waters, (2d ed.) 234–248. *East Haven* v. *Hemingway*, 7 Conn. 186. *Chapman* v. *Kimball*, 9 Conn. 38. *Hart* v. *Hill*, 1 Whart. 131, 137. *Ball* v. *Slack*, 2 Whart. 508. *Gough* v. *Bell*, 2 Zab. 441. 2 Smith's Lead. Cas. (5th Amer. ed.) 224–227. Orders about Noddle's Island and about flats, *ante*, 465, note. Acts allowing extension of wharves, and establishing harbor lines. See also the more recent English authorities, cited for the plaintiff, *ante*, 471.

5. If the lands in question belonged to the government, the special grant of the Colony Government of 1636 was upon its face a grant of the soil. That grant, so far as it is ambiguous, is to be construed against the grantor, and conveyed to Roxbury the demanded premises in fee; and they have always since been claimed, held and occupied by the town or its grantees, claiming a title in fee to the same. *Coolidge* v. *Williams*, 4 Mass. 144. *Saltonstall* v. *Long Wharf*, 7 Cush. 195. *Lapish* v. *Bangor Bank*, 8 Greenl. 85. *Thomas* v. *Hatch*, 3 Sumner, 170. *Hanlly* v. *Anthony*, 5 Wheat. 374. *McCullock* v. *Aten*, 2 Ohio, 309. *Wilson* v. *Forbes*, 2 Dev. 30. *Stinson* v. *Butler*, 4 Blackf. 285

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Felder v. *Bonnett*, 2 M'Mullan, 44. *Jones* v. *Janney*, 8 W. & S. 436. *Commonwealth* v. *Garner*, 3 Grat. 655. How can it be construed as a grant of both soil and jurisdiction over the upland, and of jurisdiction only over the flats?

6. The establishment and perambulations of boundaries of towns by the authorized public officers are competent evidence of the lines thereby defined.

7. The St. of 1814, *c.* 39, incorporating the Boston and Roxbury Mill Corporation, authorizing the effectual exclusion of tide water from the empty basin and the actual exclusion thereof by the milldam for nearly forty years, now made perpetual by the agreements of the Commonwealth; and the subsequent acts of the legislature relative to said corporation and the Boston Water Power Company and the lands in said basin; all recognizing private rights in said lands, but neither claiming nor reserving any public rights — when construed by the uniform usage of the Commonwealth in granting wharf acts, must be held to have relinquished any public rights in the premises to the owners of the adjoining lands, so that the Commonwealth cannot now set up any title to the premises claimed in this information. *Bowman* v. *Wathen*, 2 McLean, 376.

8. The bounds of Boston and Roxbury, as run out and established by the agreement of 1823, as the bounds according to the grant of 1636, having been fairly run out as soon as practicable, after the tide was excluded from the empty basin, and been assented to by the legislature, and recognized, acquiesced in and acted on, from that time to the present, must now be taken as the true bounds of the grant of 1636. *Kellogg* v. *Smith*, 7 Cush. 375. *M'Nairy* v. *Hightour*, 2 Overton, 304. *Newsom* v. *Pryor*, 7 Wheat. 7. *Lerned* v. *Morrill*, 2 N. H. 197. *Kennebec Purchase* v. *Tiffany*, 1 Greenl. 219. *Brown* v. *Edson*, 23 Verm. 435. *Berry* v. *Garland*, 6 Foster, 473. *Riley* v. *Griffin*, 16 Georgia, 141. *St.* 1836, *c.* 37.

9. The *St.* of 1836, *c.* 37, authoritatively established the line so run out as the line and boundary of the grant of 1636; so that Roxbury has a clear right, under this act of the legislature, to hold, as against the Commonwealth, the territory, as well

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as the jurisdiction, up to that line, as the true line and boundary of the grant of 1636. *United States* v. *Gratiot*, 14 Pet. 562.

10. The evidence of possession, on the part of Roxbury, shows a title to the premises in question by disseisin and possession; or if not, it shows a title in Roxbury under the act of 1636, and according to the bounds run out in 1823 and confirmed in 1836, and also under the deed from Sears in 1832.

11. However the question of title to the soil in the premises may be decided, the defendants have the right of drainage through the natural channels thereof, as set forth and claimed in their answer. If the Commonwealth recovers, it must be subject to that right. *Morgan* v. *Moore*, 3 Gray, 319.

12. If the award of the arbitrator is set aside, judgment cannot be rendered for the Commonwealth, but the case must be recommitted to the arbitrator, or the rule of reference discharged and the case stand for trial.

Shaw, C. J. [After stating the substance of the pleadings, amendments and rule of reference, and reciting the report of the arbitrator.] The objection that the premises were not described in the information with sufficient certainty, we suppose, was removed by the amendments afterward made, and by the agreement in the rule of reference that the pleadings might be amended, if need be, so as to embrace all the conflicting claims, rights and interests of the parties within the bounds described in the resolve of 1852, *c.* 79.

Whether the town of West Roxbury was summoned in, or came in on its own motion, does not appear, and is not perhaps material.

The defendants now move the court to accept the report of the arbitrator, and to render judgment thereon in their behalf; and the Commonwealth, on the report and the questions of law raised therein for the final adjudication of the whole court, moves for judgment for the Commonwealth.

The parties have respectively referred to such charters, laws, records, grants and documentary evidence, as they considered material to their respective rights; also the depositions, and some *viva voce* testimony taken at the hearing, are embraced in

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the case submitted; so that we understand that the whole evidence is before us, upon which these questions of law arise, and the rights of the parties depend.

Before proceeding to a direct consideration of the award, it is necessary to understand precisely what is the subject matter of controversy, and what was the exact issue submitted to the referee. We understand that by the information, as amended before the reference, and twice at or before the hearing, the Commonwealth claims to hold and own, as proprietor in fee, the soil of that portion of the Back Bay, within the empty basin, which, before the tide water was excluded from said bay by the erection of the Milldam or Western Avenue, was within the ordinary ebb and flow of the tide, and which lay below, that is, so far distant from the upland, as to be below the line of riparian proprietorship. By this term we understand, in its application to a case like the present, where the tide ebbs more than one hundred rods from the line of ordinary high water, that line over and along the flats, over which the tide ordinarily ebbs and flows, at a distance of one hundred rods or sixteen hundred and fifty feet from the adjoining upland. We understand therefore, that, whatever were the terms of the information before its amendments, as it now stands, the Commonwealth makes no claim to any land in the full basin, nor to any land in the empty basin, nearer to the original line of ordinary high water mark than one hundred rods, being the ordinary line of high water mark, before the exclusion of the tide water, in its natural ebb and flow.

Again; in regard to the right of drainage, which the respondents have put forward prominently in their answer; unquestionably such owners of lands in Roxbury, whether the municipal corporation, or individual proprietors of such lands as have and enjoy a right of drainage into and through the natural watercourses emptying into these channels and through them into the sea, have a right to the continued use and enjoyment of such watercourses, whether the soil, upon and over which they pass, be owned by the Commonwealth or by municipal corporations or individuals; and no question respecting them arises in the present case, which raises the question of title only.

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And further, the learned arbitrator has stated in his report, that all evidence offered on either side, whether objected to or not, was admitted by him, subject to the opinion of the whole court in regard to its competency, under this reservation, that if any part of the evidence is found to be incompetent, all facts, which such evidence would conduce to prove, and which are not proved otherwise, must be laid out of the case.

I. We come now to the consideration of the questions raised upon the report of the arbitrator; and by far the most important is that first stated. It thus appears in the report:

"The counsel for the Commonwealth contended that the title to the demanded premises, on the first settlement of the country, was vested in the Colony, and thence by the acts of the several governments passed through the Provinces to the Commonwealth. This proposition I adopted, and held, that the fee still remained in the Commonwealth, unless its government, or that of one of its predecessors, had aliened it."

In this position we entirely concur; and before going further, it may be useful to add some authorities to corroborate it, and to suggest a qualification, proper to be considered, in its application to the present case.

At the time of the settlement of Massachusetts and the other English colonies in America, the only source of title to the vacant and unsettled lands of this portion of the continent, claimed by the crown of England by right of discovery, was a grant from the king. It was not merely the only source of legal title to the soil, but the only source of authority for exercising limited powers of government, in and over the lands thus granted.

The theory universally adopted, acted upon, and sanctioned by a long course of judicial decisions of the highest authority, was, that the Indians found upon this continent had no legal title to the soil, as that term was understood at the common law and among civilized nations, no fee in the land, but only a temporary right of occupancy, for which it was perhaps equitable to make them some allowance. The fee was considered to be in the sovereign, by whose subjects it was dis

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covered, and in whose name it was taken possession of. Under this rule, this part of North America was claimed and held by the king of England. This jurisdiction extended to all tide waters, included in said territory, in the same manner as in those held by the crown within the realm of England, subject to the public use, according to the rules of the common law. But as it was held that the king, by virtue of his prerogative, had authority to create and grant political powers, necessary to the government of these new countries, it was held, that, where charters were granted to organized bodies with power of governing the colonies to be settled, like that of Charles I. to the Governor and Company of Massachusetts, they conveyed the prerogative powers of the crown, and as such included the arms of the sea, and all tide waters, to be held, like those of the crown, in trust for the public. The grantees thereby became invested with the ordinary right of property in lands for cultivation and settlement, and the extraordinary right of government, subject only to their allegiance and subordination to the parent government, including herein a power over all sea shores and tide waters.

Instead of resorting anew to the original charters, we will state what this court held to be the result and legal effect of them, in a recent case which was much discussed, and was decided after much consideration. *Commonwealth* v. *Alger*, 7 Cush. 65, 66. The court there say: "The charter under which the Colony was formed and settled — first, that of James I. to the Plymouth Company, and subsequently that of Charles I. in 1628, reciting an assignment of part of the territory formerly granted to the Plymouth Company, by that company, being all that part of said territory, [described,] which afterwards constituted the Colony of Massachusetts, to Sir Henry Roswell and his associates — did proceed to grant and confirm to Sir Henry Roswell and his associates all the said lands described, and every part and parcel thereof, and all the islands, rivers, ports, havens, waters, fishings, fishes, mines, minerals, jurisdictions, franchises, royalties, liberties, privileges, commodities and premises whatsoever, with the appurtenances. This charter was not

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merely a grant of property within the realm of England, but it contained provisions for the establishment of a separate dependent government under the allegiance of the king; and the government thereby constituted was invested with all the civil and political powers to enable it to establish and govern the Colony, and to make laws for that purpose, not repugnant to the laws of England."

We may add here, in explanation, that the Charter provided for the organization of the Company, by the appointment of a governor, deputy governor, and eighteen assistants, to be chosen by the freemen of the Company, after the first appointment made by the Charter itself. The governor, deputy governor, assistants and freemen, were authorized to admit freemen, to elect officers for the ordering of their affairs, and to make laws and ordinances, for the good and welfare of said company, and for the government and ordering, disposition and management of the said lands and plantation, and the people inhabiting and to inhabit the same, as to them from time to time should be thought meet, not repugnant to the laws of England. Anc. Chart. 8, 9.

It is probable, as it has been suggested, that the Charter was intended to create and establish a trading corporation, to meet and act in England, with large powers to manage a planting and trading colony. But there being no restriction upon their meeting and acting anywhere within the king's dominions; in about two years, the Company, by advice of counsel, determined to remove to Massachusetts; and in 1630 the governor, deputy governor, and many of the assistants and freemen, came to Massachusetts, bringing the Charter with them. From that time all meetings were held in the Colony. For a few of the first years, and whilst the plantations and settlements were few, meetings were attended according to the Charter, by all such freemen as chose to attend; but, as early as 1634, it was provided that the freemen of each plantation might choose two or three before every general court, who should have the full voices of all the freemen to act with the governor and assistants in making laws, granting lands, &c., and other affairs, excepting

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elections. 1 Mass. Col. Rec. 118. Here, then, was the origin of a representative government, probably not contemplated by the Charter, but perhaps not wholly inconsistent with it, because, if all freemen had a right to act, those delegated, being freemen, had that right; if repugnant at all to the Charter, it was in excluding those not appointed delegates.

In 1644, ten years later, a still more decisive step was taken. It was probably found that the delegates quite outnumbered the governor and assistants, and would of course outvote them, acting in one body. Divers inconveniences having been found in this mode of proceeding, and accounting it wisdom to follow the laudable practice of other states, it was ordered that henceforth the two bodies shall sit and act apart, in separate bodies, each having the initiative in proposing laws and measures, and each having a negative on the other, so that no act could pass without the concurrence of both bodies. 2 Mass. Col. Rec. 58. In this we perceive the complete establishment of a representative government, with a distribution and balance of powers. Whether this was perfectly consistent with the Charter or not, it was acquiesced in, acted on, and afterwards confirmed by the Province Charter. See *Commonwealth* v. *Charlestown*, 1 Pick. 183.

Most of the English colonies had a similar origin in the charter of the sovereign, which granted not only the title to the soil, but the powers of government, and, as incident thereto, the right of the sovereign over the sea shores, and those powers denominated *regalia*. The nature and extent of these grants, both of property and powers, have been held to be regulated by the common law of England, which the English emigrants claimed as their birthright, and brought with them. This introduced and established the common law of England, as regulating the relative rights of the government and people in this country to the sea and sea shores. The effect of this charter was, to grant to the Governor and Company, as a body, the *jura regalia* or prerogative rights of the crown, to be held for the Colony, as the crown held them for the realm of England; and also the ordinary right of property in the soil, to be held and granted on the

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liberal tenure of free and common socage, as private rights in real estate are held at common law. *Martin* v. *Waddell*, 16 Pet. 367. The same rule, substantially, was established in all the colonial governments, the authorities for which, we think, are too numerous and uniform to require citation.

There is another subject which we think it necessary to consider, before proceeding to the next point in the report of the arbitrator. We had considered it settled beyond controversy that, by the common law of England, the right of soil, not only in the sea, the *fundus maris*, was in the king, but also in the sea shore, the land between high and low water mark; and that *prima facie* the land of all private proprietors, towards the sea shore, and upon bays, arms of the sea, creeks and coves, where the sea ebbs and flows, was bounded by high water mark; but it having been intimated at the argument that some new views had recently been advanced on this subject in England, we were led to look at the authorities cited. The law in this commonwealth seemed to be settled by the case already cited, of *Commonwealth* v. *Alger*, 7 Cush. 65. There it is declared that by the common law of England, as it stood long before the settlement of this country, the title to flats was in the king, that it was so held by him in trust for public uses. This rule, apparently so well settled and established both in England and this country, seems to us not to have been shaken or doubted in any recent English case, though some bold speculations may have been advanced by ingenious counsel in argument, or by acute essay writers in the law periodicals.

In the case alluded to of the *Attorney General* v. *City of London*, reported in its several stages in various books, but finally decided by Lord Chancellor Cottenham in January 1850, this ground of the right of the crown seems to have been assumed on all sides, as the settled law of the land, and the matters of controversy turned on other points. It is so distinctly stated by Lord Langdale, Master of the Rolls, in 12 Beav. 26. See also *In re Hull & Selby Railway*, 5 M. & W. 327.

In the case of *Attorney General* v. *Chambers*, 4 De Gex, Macn. & Gord 206, decided by Lord Chancellor Cranworth, assisted

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by Baron Alderson and Mr. Justice Maule, it was also assumed on all hands, that the limit of the proprietorship, in lands bordering on the sea shore, between the king on the sea side, and the private owner on the land side, was the line of high water mark; and the question elaborately discussed was, where precisely that line should be drawn. These distinguished judges, we believe for the first time, declared the rule of law, and defined that line to be, the medium line between the ordinary line of high water in ordinary spring tides at the full and change of the moon, and the ordinary line of high water at neap tides, at about midway in time between the full and change of the moon.

Without citing other authorities, we think these modern cases show that in whatever other respects the law may have been modified, the ancient rule, on the point stated, has not been changed, and therefore we assume the doctrine to be, as stated in *Commonwealth* v. *Alger*, and confirmed by the cases there cited, that at the time of the granting of the colony charters herein before stated, the king held the sea shores as well as the land under the sea; that he held the same *publici juris* for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries.

Taking this proposition, in connection with the proposition already stated, that the king had full power, in these unsettled parts of his dominion, out of the realm of England, to grant a title to the land for purposes of settlement, and such powers of government as might be necessary; and that a charter was granted, vesting the right of soil in the grantees, with very large powers of government, including all necessary to the control and management of all public interests, of navigation and fisheries, and of the sea shore and navigable waters; the effect of this charter was, to grant to the company both the *jus privatum* and the *jus publicum* of the crown; the *jus privatum*, or title to the land, to be held in fee, parcelled out to corporations and individuals, to be held in fee, subject to the rules of the common law, as private property; and the *jus publicum*, or all those rights of the crown in the sea, sea shore, bays and arms of the

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sea, where the tide ebbs and flows, in trust for public use of all those who should become inhabitants of said territory and subjects of said government.

We proceed now to the next and most essential part of this award. The referee having come to the conclusion that the right of property in these flats is in the Commonwealth, unless it or its predecessors have aliened it, proceeds to state the introduction by the defendant's counsel of an act of the general court of the Colony of Massachusetts, passed May 25th 1636,* their claim under it, and the referee's opinion thereon, closing thus: "I am therefore of opinion and do decide, that the act of 1636, in the liberal and proper construction of the language used, operated as a grant, and vested in the then town of Roxbury the fee of the demanded premises."

In order rightly to weigh and estimate the legality of the conclusion, to which the arbitrator thus came, in putting a construction upon the ancient grant thus mentioned, several things must be taken into consideration, and in this connection dates are important; also what was the actual condition of the Colony at the time when the supposed grant to the town of Roxbury was made.

1. We are to inquire how grants of land were first made and set off to the parties interested, and how actual settlements were first made.

At one of the earliest meetings after the Charter, held in London, before the Company had thought of removing, a question naturally arose, how the adventurers should be reimbursed for their costs and charges, and to this end it was debated how some good course might be settled for the division of the lands. In the spring of 1629 a plan was agreed upon, for distributing the lands in the proportion of two hundred acres for every fifty pounds subscribed, and so in proportion; and fifty acres for each servant sent over. A special government, subordinate to that of the governor and company, was appointed, to reside in Massachusetts, consisting of thirteen persons, to be called the

* Passed April 13th, though recorded May 25th 1636. *Ante*, 463, note

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Governor and Council of London's Plantation in the Massachusetts Bay in New England; and this subordinate government, of whom Governor Endicott, then gone to New England, was to be the head, was authorized and required to make dividend of lands to those entitled, and if such allotments were not made within ten days after the settler's arrival, demand being duly made, the settler was allowed to take up his allotment upon any lands, not already appropriated. 1 Mass. Col. Rec. 42, 361–365. About the same time, for enlarging their pecuniary means, provision was made for creating a new stock, with a like right to an allotment of land. 1 Mass. Col. Rec. 68.

In consequence of these arrangements, when Governor Winthrop and the body of assistants and freemen came over with the Charter in 1630, a considerable number of allotments and grants of land had been made by the local government, and several settlements or plantations had been then formed. The settlers, in selecting their allotments, would naturally take up the lands in considerable numbers near each other, for their better mutual security against the dreaded enemy, the Indians. The terms "plantation," "town," and "township" seem to be used almost indiscriminately to indicate a cluster or body of persons inhabiting near each other; and when they became designated by a name, certain powers were conferred upon them by general orders and laws, such as to manage their own prudential concerns, to elect deputies and the like, which in effect made them municipal corporations; and no formal acts of incorporation were granted till long afterwards.

At the second meeting in the Colony, at Charlestown, on the 7th of September 1630, the following order was passed: "It is ordered that Trimountain shall be called Boston; Mattapan, Dorchester; and the town upon Charles River, Watertown." 1 Mass. Col. Rec. 75. We doubt whether these places had any formal act of incorporation during the existence of the Colony, or any other recognition by the government of a corporate existence.

At the last meeting of the governor and assistants at Charlestown, before removing to Boston, on the 28th of September

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1630, an order passed indicating the several plantations or townships then existing, and their relative importance, by a rate assessed on them as follows, to raise £50:

Charlestown	£ 7
Boston	11
Dorchester	7
Roxbury	5
Watertown	11
Medford	3
Salem	3
Wessaguscus [Weymouth]	2
Nantasket	1
	£50

We think no essential change in this respect took place till long after 1636, the date of the grant to Roxbury. Lands were allotted and assigned to settlers in severalty, and settlements were formed without any previous survey of the territory; and towns, as settlements, were taxed, and vested by general acts with powers, which in effect made them corporations, but without bounds or limits. And the ancient records are full of orders, providing for the establishing of bounds between one town and another.

2. Another important consideration in putting a construction upon this grant is, that it was, in time, several years before the act usually known as the colony ordinance of 1641, though probably passed in 1647, by which "it is declared, that in all creeks, coves and other places about and upon salt water where the sea ebbs and flows, the proprietor or the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above one hundred rods, and not more wheresoever it ebbs further." Anc. Chart. 148. For a full statement of the character and effect of this act, see *Commonwealth* v. *Alger*, 7 Cush. 67.

Under these views we come to consider the grant by the Colony in 1636, and ascertain its effect and operation. The

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form of this act is as follows: "Ordered, that all the rest of the ground lyeing betwixt Dorchester bounds, and Boston bounds, shall belonge to the towne of Rocksbury, easterly of Charles Ryver (except the propriety of the aforesaid town which they purchased of particular persons) Rocksbury not to extend above eight myles in length from their meeting howse."

Supposing this to be a grant of property in land, by the Company, represented by the colonial government, then meeting and acting within the Colony of Massachusetts Bay, and having superseded the subordinate and temporary government of which Governor Endicott was the head, which had previously been authorized to appropriate and grant lands, the question is, what was the subject matter, what estate passed by this grant. When the boundaries, monuments and local objects, constituting the descriptive part of a grant, be it deed or record, are fixed by the evidence as matters of fact, the construction of such deed, its effect and operation, is a question of law.

These boundaries, abuttals and monuments are fully set forth, in the report, by reference to the acts and records, many of which are specified and enumerated in the report and others are generally referred to. The first named is "Dorchester bounds," that is, the bounds between Dorchester and the plantation or settlement called Roxbury, which the language of the order implies had been previously settled. Committees had been appointed, and surveys directed for that purpose; it might be, and no doubt was, corrected afterwards. But it was assumed to be settled, and sufficiently accurate to stand as a boundary. It appears by the description and plans, that it was a line, extending up from Boston Harbor, between Boston proper and Dorchester Point, now South Boston, through what is now called the South Bay, and then run in a line designated, in a westerly direction, to the bounds of Dedham at Charles River.

The boundary expressed on the other side, being the northerly or northwesterly side, is "Boston bounds." By this term, it is manifest, was intended the line of a tract of land at Muddy River, now Brookline, which was assigned to the inhabitants of Boston as an enlargement of their limited territory. Its well

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established bounds, northerly and westerly, were Cambridge (now Brighton) and Newton. This settlement at Muddy River, at the time of the grant in question, was regarded and designated as part of Boston, and so remained half a century afterwards. In 1686, by an order of the president and council, the chartered government being then superseded, the inhabitants of Muddy River, then called a hamlet of Boston, were exempted from town rates to the town of Boston; they maintaining their own highways, poor and other public charges, arising amongst themselves, and annually meeting and choosing three men to manage their affairs.* In 1705, after the establishment of the provincial government, they were granted the powers and privileges of a township, to be called Brooklyn, provided that all common lands belonging to Boston should still remain to the proprietors of said lands. [*Ante*, 465, note.] At the time of this grant, therefore, "Boston Bounds," expressed in it, was the dividing line between Roxbury and the settlement at Muddy River, and nearly coincided with the present dividing line between Roxbury and Brookline, a line that formerly extended to Charles River, which was the easterly line of Dedham. It appears then by referring to the boundaries of the adjoining towns, and to the surveys and plans, that a part of Charles River, forming the easterly line of Dedham, is so situated that a line protracted in

* "At a Councill held in Boston, New England, December the 8th 1686.
"Joseph Dudley, Esqre, President. William Stoughton, D. P.
"Wait Winthrop, Rich. Wharton } Esqrs. Bartho. Gedney, John Usher } Esqrs. Jonath. Tyng, Edward Randolph } Esqrs."
"In answer to the petition of the Inhabitants of Muddy River, praying to have liberty to erect a schoole, &c. Upon hearing thereof, the President and Councill do Order, that henceforth the said Hamlet of Muddy River be free from town rates to the Towne of Boston, they maintaining there own high ways and poor, and other publick charges riseing amongst themselves, and that within one yeare next comeing they raise a schoole house in such place as the two next Justices of the County, upon a public hearing of the Inhabitants of the said Hamlet, shall determine, as also maintaine an able reading and writing master there, from and after that day, and that the Inhabitants annually meet to choose three men to mannage their affaires." Copies of Council Rec. 1686, fol. 94, 97, in Office of Secretary of Commonwealth.

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a westerly or southwesterly direction would strike it, and that the bounds of Dorchester, on the southerly side, did strike it.

Here are then two side lines, as well defined as the nature of surveying at that time admitted, and both in fact extending from the seaboard to the interior, towards Charles River. We are then to look for the residue of the description, "all the rest of the ground lying betwixt Dorchester bounds and Boston bounds, easterly of Charles River, Roxbury not to extend above eight miles in length from their meeting-house."

At that period, it was a common practice, in establishing the bounds of the front range of towns on the seaboard, to extend them eight miles into the interior. In 1635–6 it was ordered that Charlestown bounds shall run eight miles into the country, from their meeting-house, if no other bounds intercept. 1 Mass. Col. Rec. 168. So Watertown is to run till it be eight miles from their meeting-house. 1 Mass. Col. Rec. 257. Other instances might be named.

When, having fixed side lines, which if protracted would extend to Charles River, the grant says "all the rest of the ground, lying betwixte" those two lines, "easterly of Charles River;" if unlimited, it would obviously make that part of Charles River the westerly boundary. But the grant was not unlimited; it was qualified by the limitation, that it should not extend above eight miles from the meeting-house. The distance was probably unknown, it might be six or seven, or perhaps nine or ten miles. A specific limit was therefore inserted in terms. The word "rest" or residue "of the ground," &c., implies that part of the land, then known as the town or plantation of Roxbury, perhaps a large part, had been previously taken up by settlers entitled, or granted out by the provisional government under Endicott. The lands thus granted and settled would naturally be those near the seaboard, and the village be formed so that the lands in the interior would be those remaining longest ungranted and unsettled. Indeed there was an order of the government, previous to this grant, that no dwelling-house should be built above half a mile from the meeting-house in any new plantation, without leave from the court. 1 Mass. Col. Rec. 157.

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It appears to us therefore, that this last clause describes, in an alternative form, the westerly line of the intended grant, and that it embraced all the remaining interest of the government in the ungranted and unsettled lands, in remoter parts of the plantation lying between the two fixed lines described, and extending westwardly to Charles River, if it should be found not to exceed eight miles from the meeting-house, and, if it should exceed eight miles, then by a straight line drawn across from one of those to the other at the distance of eight miles.

This construction gives effect to all the words of the grant; but upon any other view, if the term "Charles River" as used in the grant, does not mean that part of Charles River lying next to Dedham, and used in the alternative as one of the bounds of the grant, then the grant has no westerly bound whatever. A circumstance which confirms this construction is this: It was testified on the trial that from the meeting-house, which, it is agreed, stood where the present meeting-house now stands, the distance was between seven and eight miles, that is, less than eight miles. And by a subsequent colonial order, in 1638, it was directed "that the town of Roxbury shall have four thousand acres of land, where it may be laid out without prejudice to any plantation or former grants, because Dedham doth shorten them." 1 Mass. Col. Rec. 220. This indicates that Roxbury did not get its full eight miles, and therefore Charles River, being the line of Dedham, did in fact constitute the westerly boundary of this grant, by that branch of the alternative which makes Charles River, if within eight miles, the boundary.

Suppose this colonial act then to be a grant, with well defined boundaries on three sides, but no expressed boundary on a fourth side; a deed is not to be held void for uncertainty because the boundaries are not fully expressed, when by reasonable intendment it can be ascertained what was considered and understood by both parties to be embraced, and intended to be embraced in the description. The obvious and legal course, we think, is to lay down a plan on the land, according to ascertained boundaries, abuttals and monuments, on these three sides,

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and thus see where the fourth would come; if it terminate on the sea or salt water, on a highway or public common, or on a well established line of private property, such deficient line will be supplied by necessary intendment, and the instrument be read as if it were so expressed. This rule is essential, and has been constantly adopted in the legal construction of the brief and inartificial grants, deeds and other forms of conveyance, in use at the early period when this colonial grant was made.

But the result, it appears to us, would not have been different, if we are mistaken in supposing that by the name "Charles River," as expressed in the ordinance, was intended that part of Charles River at the interior and most remote part of the granted territory; and that by the term "Charles River" was intended what is now known as the Back Bay, being a widening or enlargement of Charles River, and intended to be the eastern or northeastern boundary of the grant. This bay was then, still is in part, though affected by the Milldam, an arm of the sea, in which the tide ebbs and flows; and the law, as it then stood, carried the public right in the sea and sea shores to the ordinary high water line of the flow of the tide; and as, in the case supposed, the river was the boundary of the grant, and high water mark the limit of private ownership, the flats in question could not be included in or pass by it.

But even if the colonial act in question had been passed after the ordinance of 1641, extending a qualified right of the soil of riparian owners, to the extent of an hundred rods, and the grant had been bounded, in express terms, or by necessary intendment, on the sea, it would have carried the right of the grantee to one hundred rods only below the ordinary high water line, and would not have included the flats in question, which are beyond one hundred rods.

We lay no great stress on the use of the word "ground" instead of land; though by the term "rest of the ground," where lands had been granted for cultivation and settlement, it could be hardly contended that land flowed by tide water was intended, without some context or qualifying word of description indicating such an intent.

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3. But it is argued and insisted in behalf of the defendants, that as the colonial government was at the time of the grant vested with the right of ownership in the soil, and also, as an incident thereto, with the right of government, with a prerogative right and interest in the soil of the sea, sea shores and arms of the sea, the government of the Colony had power to grant an interest in flats, as well as in upland; and the bounds of this grant being indefinite towards the tide water in the Back Bay or Charles River, the deed is to be taken most strongly against the grantors, and it must be presumed that they intended, when not limited in terms, to convey all which they had the power to convey.

But we think the argument does not apply. In the first place, the ordinary technical rule of presumption, that words are to be taken most strongly against the grantor, has no application. The colonial government stood in two relations to its subjects: first, as owners of the land, to be granted to settlers and purchasers, to be held in severalty in fee; and secondly, as incident to the powers of government, they held a prerogative right to the sea and sea shores, in a fiduciary relation, for the public use. As a general rule, in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor — reversing the common rule as between individuals — on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant prepared by him, and submitted to the government for its allowance. But this rule applies *a fortiori* to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also of a portion of that public domain, which the government held in a fiduciary relation, for general and public use. This rule, with its necessary qualifications, is well stated in the opinion of Mr. Chief Justice Taney in *Martin* v. *Waddell*, 16 Pet. 411. That case is of the highest authority and directly in point as to the application of the legal maxim.

But secondly, where a body like the colonial government

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holds two distinct powers, one for granting and distributing lands to parties entitled, for settlement in perpetuity, and of which power it is in the habitual and constant exercise, as one of the ordinary and prominent purposes of its establishment; and at the same time has a fiduciary interest and authority over the public domain; the grant, whilst it conveys the land embraced in it, will not be held to include any portion of such public right, unless it is included in its terms, by express words or necessary implication.

In the construction of a grant, the court will take into consideration the circumstances attending the transaction, the situation of the parties, the state of the country, and of the thing granted, at the time, in order to ascertain the intent of the parties. *Adams* v. *Frothingham*, 3 Mass. 352. In that case, a grant from the town of Newbury to Noyes in 1680, on an arm of the sea, indefinite in its direction towards the channel, was held to intend a conveyance to low water mark, being within one hundred rods, because the ordinance of 1641 had then so extended the right of the town to the upland owners, as to make the flats to that extent their private property.

So in other states, where the same rule of the common law existed, it was held that by the king's charter the right of property vested in the colony, and as superadded thereto, the right of government, and, as incident to this, the *jus publicum* over sea shores and tide waters; but where no such law as the Colony ordinance of Massachusetts of 1641 was ever adopted, it has been decided that a grant of lands lying on the sea shore or an arm of the sea will not convey land beyond high water mark. As where the government of Connecticut in 1685 confirmed to proprietors, who had purchased of the Indians, lands including an arm of the sea, and with all ports, rivers, &c., it was held not to be a grant of the soil between high and low water mark. *East Haven* v. *Hemingway*, 7 Conn. 186. *Middletown* v. *Sage*, 8 Conn. 221. In New York it has been decided, that no exclusive right, adverse to that of the sovereign and public right, in the soil of the shore below high water mark, can be acquired by a town, by the operation of an act of the legislature, extend-

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ing the limits of such town over such waters. Such act may give jurisdiction, but no right of property in the soil. *Palmer* v. *Hicks*, 6 Johns. 133. Similar decisions are to be found in some of the other maritime states.

The distinction, above alluded to, between the right of property and the right of jurisdiction, in the towns in this commonwealth, is of great importance. Counties are composed of towns. And for many purposes, the body of the county extends not only over the shores of the sea, but to some distance below the ebb of the tide, for many purposes of civil and criminal proceedings, and for certain purposes of jurisdiction; and, for the like purposes, towns may be considered as having a coextensive jurisdiction; but this has no bearing upon the question of property. An act of incorporation therefore, without words of grant of the soil, would vest no part of the property of the government in such town. Nor was the purpose of the organization of such a nature, as would require of the government any portion of the public right vested in them for public use and benefit, therefore no portion of the *jus publicum* will be presumed to have been granted, without express words. On the contrary, it was held in an early case in Massachusetts, that towns, in virtue of their authority to lay out town ways, cannot exercise that jurisdiction over lands between high water and low water mark, although plainly within their territorial limits and jurisdiction, and that a town had no authority by its surveyors to enter on flats to abate a nuisance. *Austin* v. *Carter*, 1 Mass. 231. Courts of sessions and county commissioners, under a general authority to lay out highways, cannot lay them over tide waters, without special authority from the legislature. This, we think, is founded on, and affirms the principle, that an authority granted by the government to take land for highways, general in its terms, will not be construed to authorize like powers to be exercised over flats formed by navigable waters, unless such power appear by express words or necessary implication. *Commonwealth* v. *Coombs*, 2 Mass. 489. *Arundel* v. *McCulloch*, 10 Mass. 70. The legislature alone have that power. *Charlestown* v. *County Commissioners*, 3 Met. 202.

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Kean v. *Stetson*, 5 Pick. 492. *Marblehead* v. *County Commissioners*, 5 Gray, 451.

But it appears, that as early as the grant in question, and before the ordinance of 1641, declaring the right of all persons bordering upon tide water, to have a qualified and limited right of flats, the Colony government, when they intended to grant a right of flats, did it in express terms. By an order passed in March 1636, Noddle's Island was granted to Boston, in the briefest possible terms, without limit or qualification. 1 Mass. Col. Rec. 189. At a meeting of the governor, assistants and a large number of deputies, in May 1640, this order was passed: "It is declared that the flats round about Noddle's Island do belong to Noddle's Island, to the ordinary low water mark." 1 Mass. Col. Rec. 291. By the grant of the island, without qualification, the whole island passed. Under the ordinary maxim that words are to be construed most strongly against the grantor, and the presumption that all passed which the grantor could convey, the flats would have passed by the first act. But the second order shows, that it was not so understood by the parties; and in order to give title to the flats, the second grant was necessary.

4. Again; the inquiry strongly impresses itself on our minds, if the grant to Roxbury, regarded either as a grant to a corporation, or to the proprietors as tenants in common by an aggregate name, carries with it a title to all the grounds over which the tide flowed; why would not the same be true in regard to every other maritime town in the Colony? They all derived their titles from the government. Either grants were made in severalty to a considerable number of settlers, who were afterwards recognized as a plantation, settlement or town by a proper name, vested by general laws with certain powers, and after wards had their bounds declared; or, at a much later period, grants were made to a company of individuals named, of a tract of land, with the view to constituting a town afterwards. In either case, their rights and powers, both of soil and jurisdiction, would seem to be the same with those of Roxbury; and yet we know of no instance of any claim made by any municipal cor-

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poration or proprietary to flats below high water mark, before the Colony ordinance of 1641, or beyond the line of riparian proprietorship, since the passage of that ordinance.

Again; if the argument be sound, that because the government had power to alienate the public domain, it must be presumed that they intended so to convey it, unless expressly limited, why should the grant be limited to the channel or line of low water? for the right of the public and the power of the government to control and appropriate the same beyond low water, was the same. In its application to the grant in question, this construction would extend the grant of soil to the town of Roxbury, not only to the channel of Charles River, but to the bed of the channel and the flats beyond, quite to the shores of Charlestown and part of Boston, which cannot plausibly be pretended.

In this view of the rules of the common law, here adopted from the earliest settlement, of the state of the country, of the date of the grant, of its obvious intent, we come to the construction of this grant. Roxbury was not a corporation in the sense in which we now understand the nature of a corporation, but was a plantation or settlement of proprietors, who had received grants of land, living near each other, which settlement had acquired a name; the grant was made to those settlers, for the enlargement of their estates; but, like other grants to proprietors as an aggregate body, but not strictly a corporation, it must be held to communicate some limited corporate powers sufficient to enable them, as a proprietary, to manage, divide and alienate its property amongst themselves, or grant them to new comers. It was in these words:

"Ordered, That the rest of the ground lying betwixt Boston bounds and Dorchester bounds shall belong to the town of Roxbury easterly of Charles River, (except the propriety of the aforesaid town, which they have purchased of particular persons,) Roxbury not to extend above eight miles in length from their meeting-house."

In putting a legal construction upon this grant, we are unable to concur in the conclusion to which the arbitrator came. We

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are of opinion that it did not pass to the grantees any right, title or interest in the soil of the flats of Charles River or the Back Bay, below the line of ordinary high water mark; and of course they could acquire no title to flats lying more than one hundred rods seaward below such high water line.

If there is no intelligible description of limits in this grant, it must be held void for uncertainty, and convey nothing, which would be subversive of the title of the defendants, who claim under it. We should hesitate long before putting this construction on a grant made at so early a period and under such circumstances, and would adopt it only as a last resort, when all other means had failed, which, for reasons already given, we think is not necessary. There is no local or descriptive term in the grant, which has the appearance of being a northeasterly boundary, except Charles River, which we have supposed was not used for that purpose. The actual boundary, on that side, was in part only on Charles River and the Back Bay. The grant was of all the ground between Dorchester bounds and Boston bounds; and therefore land bordering on the South Bay, between Dorchester and Boston proper, as well as that on the west side, between Boston proper and the old Boston bounds at Muddy River, constituted the actual northeastern side of this grant on tide water. The name "Charles River" would be wholly inapplicable to that line. But if we could go so far as to presume a mistake of the terms of the description, and instead of "easterly of Charles River," it had been "easterly on Charles River," and even added, "and the South Bay;" if the terms "Charles River or Back Bay," and "South Bay," as they are now understood, had been used, both being then as now arms of the sea, the grant could not by law extend beyond the ordinary high water line. If we supply the deficient description, by substituting these words as being, by a reasonable intendment, what the parties understood — and something must be supplied to give effect to the grant — the result must be the same.

If indeed the same grant, in the same terms, had been made after the Colony ordinance of 1641 or 1647, it would have car-

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ried the flats to the extent of one hundred rods, not because the description would have been more comprehensive, but because, when by reasonable intendment the deficient description is supplied by limiting it to the sea, or sea shore, then the law annexing a qualified right of flats to the upland propriety thus granted, the flats would have passed as an appendance. But this would have carried the right one hundred rods only, and would not have included those flats beyond one hundred rods. It may be added in this connection, that if this grant preceded the colony ordinance, when that ordinance did pass, it annexed the flats to the upland; if the town were then owners of any portion of the shore, it would have enured to their benefit; if it was held by private proprietors, either derivatively from the town, or by original direct grants from the colonial government, it would have enured to their benefit respectively.

In any possible view in which we can place this act of the colonial legislature, we are of opinion that it did not convey to the town of Roxbury the premises now in controversy; but the title remained, as it was before, in the Colony.

That the construction of statutes, wills, deeds and other instruments of conveyance, when the facts of locality and description are ascertained, is a matter of law, is a position well established. We will cite one case only, but one of high authority, which marks the distinction with great precision and clearness.

In *Macbeath* v. *Haldimand*, 1 T. R. 172, it was contended that the effect and meaning of certain letters, respecting a contract for public supplies, was matter of law. All the judges expressed an opinion, that being written instruments, the construction was matter of law for the court. But Mr. Justice Buller stated the general rule and its limitations with great accuracy, thus: "If letters be written in so dubious a manner, as to be capable of different constructions, and can be explained by other transactions, the whole must be left to the jury; for they are to judge of the truth or falsehood of such collateral facts, which may vary the sense of the letters themselves; but if they be not explained by any other circumstances, then like deeds or other

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written agreements, the construction of them is a mere matter of law." The facts in that case were altogether different, and it is cited only as a clear and authoritative statement of the settled rule of law, that the construction of all written documents, when the facts are proved, on which their meaning depends, is a question of law for the court.

II. The next question mentioned in the report is thus stated: "It was contended by the defendants' counsel, that the exclusion of the tide water from the empty basin, by authority of the act of June 14th 1814 and subsequent acts of legislation, vested in the adjoining owners all the land thus made bare, or at any rate operated as an extinguishment of all rights of the Commonwealth. But I was of opinion that neither the act of 1814 and proceedings under it, nor any other acts of the government, divested the Commonwealth of any right or title which it had in the premises."

We fully concur with the referee in this opinion. But as the question has again been raised and argued before us, it seems proper to state some of the reasons on which our opinion is founded, especially as no reasons are given in the report.

The act of 1814 simply confers on the corporation thereby created an authority, a privilege or franchise, to exclude the tide waters from the empty basin, and to use it as a receiving basin, for the purpose of mill power. There are no words of grant of soil, nor anything which implies it. The most which it can be construed to confer on the corporation is an easement, a franchise, an incorporeal hereditament, leaving the title unaffected. The view taken of it by the court, in the case of *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 476, was, that before this act passed "the owners of the upland owned the flats to the extent of one hundred rods. The Commonwealth had the title to the flats beyond. So far as it regarded the right of the public, the corporation acquired it by the act of the legislature. But the flats between the upland and those belonging to the Commonwealth must be subjected to the control of the corporation, or they could not carry their undertaking into effect." The "right" of the public; what was the right? The subsequent

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clause, we think, explains it; it was subjected, like that of other owners, to the control of the corporation. It was a perpetual right to use it, for flowage only, and not for building. It is an easement, not a title. But secondly, if it made any grant, it was to the corporation and not to riparian proprietors, or any other party. No other party can set it up to defeat or extinguish the right of the Commonwealth. Thirdly, no reservation or exception of the right of the Commonwealth to the soil was necessary, because the soil was not granted, but remained as if no such grant had been made.

It is true that, after this act, the Commonwealth could make no beneficial use of the title in fee, for building or the like; but the corporation could make no other use of their easement, or right of flowage, without the consent of the government; but the government and the corporation, by reuniting the fee of the soil and all easements and franchises over it, have power to give a good title for all purposes, and this can in no respect enlarge or diminish the rights of the defendants.

III. The next question suggested in the award embraces the matter contained in the four next paragraphs of the report.

The defendants' counsel contended that because the flats in question were described to be within the limits of Roxbury, they were, "by virtue of the original settlement of the town and the act of 1636, necessarily the property of the town."

We do not know precisely what is intended here, by "the original settlement;" if any act of the government is intended, we know of none. It is believed that no formal act of incorporation of any town was passed during the existence of the Colonial government. Roxbury was recognized as a settlement, and, as we have seen, assessed as such in 1630, and so remained to the time of the grant in question. But even an act of incorporation, without an express grant of the lands within it, would not, in our judgment, effect a transfer of the public lands. Such an act, with limited bounds, would pass municipal jurisdiction, but not soil. There was a practice, we believe, at a much later time, after the establishment of the provincial government by the Charter of 1692, to grant a tract of

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and or township of land to a body of individuals named, constituting them proprietors and tenants in common, with a view to their incorporation afterwards as a town. But then they took the fee in the land, by force of the first grant, and not by force of the act of incorporation, when one passed.

It is further contended, in two or three different forms, that the agreement of Boston and Roxbury in 1823, and the statute of 1836 affirming it, were evidence bearing upon the question of property. But we fully concur with the referee in his conclusion, that these acts can have no such effect; and for the unanswerable reason assigned by him, that Roxbury and Boston could by no acts of theirs, however formal, impair or affect the rights of the Commonwealth; and the *St.* of 1836, *c.* 37, does nothing more than establish the lines as they have been mutually agreed on, as the boundary lines between said city and town.

The only plausible argument drawn from this statute is upon the use of the word "territory," in the last clause, which is as follows: "And the territory and jurisdiction on either side of the said lines as hereby established are accordingly confirmed to the said city and said town respectively." In our judgment, this clause affects jurisdiction only. It creates no new title; it confers no new rights; it gives the authoritative effect of law to a line before uncertain. The term "territory" was properly used; it fixes the civil and political rights of all those who may build houses and become inhabitants on the one or the other side of this line. It has no bearing upon the question of property.

We would add here, in general terms, in regard to a great mass of evidence made part of the case, that all the early acts fixing boundaries between towns, all the perambulations of lines made by selectmen and recorded in town books, have no tendency to prove or disprove title; they affect the question of jurisdiction only, and for the purpose of the present inquiry may be laid out of the case.

It may be added, as to the earlier acts of the Colony, fixing boundaries, they merely affect the rights of the respective towns, unless there be some records of grant by the government;

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and as to all these perambulations, that they are to ascertain and mark boundaries, and not to alter or vary them; and as to the Commonwealth they are *res inter alios* and cannot affect its rights.

IV. The only other question is that of disseisin, all the evidence respecting which is reported.

We are entirely satisfied that the defendants acquired no title by disseisin, and on this point fully concur with the referee.

V. In considering what is the proper judgment to be rendered in this case, we are necessarily referred to the submission, which is rather peculiar, and the award made under it.

It seems to have been the desire and purpose of the parties to make the award conclusive, and by the combined action of the arbitrator, and of this court, to effect a speedy decision of all questions of law and fact, on which their contested rights depended, and to render the judgment upon them final. The case was referred to a learned and eminent jurist of much judicial experience, under an agreement that the pleadings might be so amended, if need be, as to embrace all the conflicting claims, rights and interests of the parties, embraced in a resolve specified, and with a provision that the referee should report all questions of law arising in the cause to the court, for review and final adjudication — meaning, that the referee should award and determine the whole cause, including the law and the facts, but subject to the review and final adjudication of all matters of law in the cause by the full court. The referee has made his award accordingly, admitting all the evidence offered on both sides, whether objected to or not, subject to the opinion of the whole court as to its competency and relevancy. The evidence upon the main question is mostly documentary, with reference to fixed localities. All the evidence in regard to possession is reported. He also reports, that in his opinion the title to the flats in question is in the Commonwealth, unless it has been alienated by the government or by one of its predecessors. No such act of alienation or grant is relied on or given in evidence to effect such alienation, except the Colony ordinance of 1636. The referee was of opinion that this act did operate

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as such alienation in favor of the defendants. But we are of opinion, that upon the facts shown and referred to in the report, the construction of this ordinance was a question of law, and upon that question this court is of opinion that that act did not effect such alienation, and therefore that the title still remains in the Commonwealth, concurring in all other respects with the referee.

The judgment, we think, may be something in the following form: Report of the referee read and accepted, subject to the opinion of the whole court in matters of law; the court are of opinion in point of law, that the grant from the colonial government to the town of Roxbury, in 1636, did not include any land bordering on the sea or tide waters, below ordinary high water mark, and therefore that judgment for the title and possession of the demanded premises be entered for the Commonwealth. *Judgment for the Commonwealth.*

NOTE. By "the Great Patent of New England," as it is generally called, James I. on the 3d of November 1620 granted to "the council established at Plymouth in the county of Devon, for the planting, ruling, ordering and governing of New England in America," and to their successors and assigns forever, "all that circuit, continent, precincts and limitts in America, lying and being in breadth from fourty degrees of northerly latitude from the equinoctiall line, to fourty eight degrees of the said northerly latitude, and in length by all the breadth aforesaid throughout the maine land from sea to sea, with all the seas, rivers, islands, creekes, inletts, ports and havens," and "together also with the firme lands, soyles, grounds, havens, ports, rivers, waters, fishings, mines, and mineralls, as well royall mines of gold and silver, as other mines and mineralls, precious stones, quarries, and all and singular other commodities, jurisdictions, royalties, priveliges, franchises, and prehominences, both within the same tract of land upon the maine, as also within the said islands and seas adjoining;" "not actually possessed or inhabited by any other christian prince or estate," nor within the limits of the Southern Colony, previously granted. 1 Hazard's Hist. Coll. 105, 111; Plym. Col. Laws, (ed. 1836,) 3, 10. 3 Archæol. Amer. xii–xv.

On the 19th of March 1627–8 this council granted to Sir Henry Roswell, Sir John Yonge, Thomas Southcott, John Humphrey, John Endicott and Simon Whetcombe, their heirs and assigns, and their associates forever all that part of New England extending from three miles north of every part of the Merrimack River to three miles south of every part of the Charles River and from the Atlantick to "the South Sea," and all lands, waters, fishings and mines, all islands lying on the coasts, and "all jurisdictions, rights, royalties, liberties, freedoms,

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immunities, privileges, franchises, preëminencies and commodities whatsoever which they the said council established at Plymouth" had. The original of this grant is not known to be in existence, but it is recited in the Royal Charter of the following year, as a mere transition step towards which it was probably taken, and which is a firmer basis of the subsequent government of the Colony than this grant. 1 Mass. Col. Rec. 4, 5; Anc. Chart. 3. 1 Palfrey's Hist. N. E. 290 notes, 308 note. Opinion of Chief Justices Rainsford and North in 1677, 1 Belknap's Hist. N. H. Appendix, xxxiv. 1 Hutchinson's Hist. Mass. (3d ed.) 16, 17. Bradford's Hist. Plym. 250, 251, Deane's note. 1 Bancroft's Hist. U. S. 321, 408. *Commonwealth* v. *Charlestown*, 1 Pick. 183. *Commonwealth* v. *Alger*, 7 Cush. 65, 66. *Commonwealth* v. *Roxbury*, *ante*, 479, 480.

The six patentees named in this grant acted in behalf of a large number of others. Endicott was the only patentee who came over at that time; and none of the others except Humphrey ever came at all. 3 Archæol. Amer. xlvi, lii. John White, the minister, (called in Fuller's Worthies "the father of the Massachusetts Colony,") wrote in 1630 that after the unsuccessful attempt to found a colony at Cape Ann, and the return to England of most of those adventurers, "the business came to agitation afresh in London," and "some men shewing some good affection to the worke, and offering the help of their purses, if fit men might be procured to goe over, enquiry was made whither any would be willing to engage their persons in the voyage; by this enquiry it fell out that among others they lighted at last on Master Endecott, a man well knowne to divers persons of good note; who manifested much willingnesse to accept the offer as soone as it was tendered; which gave great encouragement to such as were upon the point of resolution to set on this worke of erecting a new colony upon the old foundation." White's Planters' Plea, c. 9, p. 43, in 2 Force's Hist. Tracts. 3 Archæol. Amer. xx, xxvi, 2.

Endicott sailed on the 20th of June, and arrived at Salem on the 6th of September 1628. 3 Archæol. Amer. lii, 8. Hutchinson, who wrote with Endicott's instructions from his associates before him, says that "all the affairs of the Colony were committed to his care." 1 Hutchinson's Hist. Mass. 16. The first entries in the first volume of the Massachusetts Colony Records consist of a list, made before Endicott sailed, of the supplies for his expedition, followed by a second list entitled "To provide to send for Newe England," in which the religious instruction and the civil organization of the Colony stand first, viz.: "Ministers. Pattent under seale. A seale." 3 Archæol. Amer. 1–7. 1 Mass. Col. Rec. 23, 25. 1 Palfrey's Hist. N. E. 289, note. Before a charter was obtained, Matthew Cradock, on the 16th of February 1628–9, wrote "in the behalf of our whole company (which are much inlarged since your departure out of England)" to Endicott, acknowledging advices of his arrival. 3 Archæol. Amer. 8; 1 Mass. Col. Rec. 383.

The Colony Charter granted and confirmed to these six patentees and twenty associates the same territory as the grant of 1628 from the Plymouth Company, yielding and paying therefor to the King the fifth part of the gold and silver ore

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there obtained; and constituted them "one body corporate and politique in fact and in name by the name of the Governor and Company of the Mattachusetts Bay in Newe England," with full powers of government, including the "setling of the formes and ceremonies of government and magistracy fitt and necessary for the said plantation and the inhabitants there, and for nameing and stiling of all sortes of officers, both superior and inferior, which they shall finde needfull for that government and plantation, and the distinguishing and setting forth of the severall duties, powers and lymitts of every such office and place," and the forms of their oaths, and "the disposing and ordering of the elections of such of the said officers as shall be annuall, and of such others as shall be to succeede in case of death or removall;" and provided that "their our letters patents or the duplicate or exemplification thereof shalbe to all and everie such officers, superior and inferior," a sufficient warrant; and that "all and everie such chiefe commaunders, captaines, governors, and other officers and ministers" as should be employed by the Governor and Company, "either in the government of the saide inhabitants and plantation, or in the waye by sea thither or from thence, according to the natures and lymitts of their offices and places respectively," should "have full and absolute power and authoritie to correct, punishe, pardon, governe and rule" all English subjects inhabiting the said plantation, or voyaging thither or from thence, according to the orders, laws and instructions of the Company. 1 Mass. Col. Rec. 5–17; Anc. Chart. 4–15.

This charter was obtained on the 4th of March 1628–9; and Cradock, who was named therein as governor of the Company, took the oaths as such on the 18th, and the deputy governor and assistants were sworn on the 23d of March. 1 Mass. Col. Rec. 19, 37 *a*. On the 6th of April 1629, the Company appointed committees "for making orders and power for meet government of New England, to write letters to Captaine Endicott, to order divisions of land and whatsoever may concerne the Companyes affayres," and, among other things, "to gett the exemplification of the Letters Patents." 1 Mass. Col. Rec. 37 *a*; 3 Archæol. Amer. 30 *a*. A letter to Endicott and his council was accordingly written on the 17th of April, and approved by the Company on the 27th. 1 Mass. Col. Rec. 37 *i*, 386; 3 Archæol. Amer. 30 *a*, 30 *f*, 79. Meanwhile, on the 8th of April, the Company had required Ralph Smith, as a condition of being permitted to go out, to bind himself "not to exercise the ministery within the lymitts of our plantation, neither publique nor private, without the consent and approbation of the government there established by us," and "to submitt to such orders as shall be there established." 1 Mass. Col. Rec. 37 *f*, 390; 3 Archæol. Amer. 30 *b*, 30 *c*, 85.

The Company's letter informed Endicott that they had "confirmed" him governor of their plantation, and had provided a council for him, of whom the old planters might choose two, "in that wee would have their consent (if it may bee) in making wholesome constitutions for government;" and committed the settlement of the claims of John Oldham to the discretion of Endicott and his council, warning them that "the preservation of our privileidges will chiefly depend (un-

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der God) upon the first foundation of our government." This letter was accompanied by duplicates of the Charter and seal of the Company; and suggested to Endicott to "publish a proclamation" to prevent injuries to the Indians, "by leaving it fixed under the Companye's seale in some eminent place, for all to take notice." 1 Mass. Col. Rec. 386, 387, 389, 393, 394, 396; 3 Archæol. Amer. 79, 80, 84, 87, 89, 93.

The first formal election, however, of a governor and council for the Colony appears to have been made on the 30th of April 1629, when the Company "thought fitt to settle and establish an absolute government at our plantation in the said Mattachusetts Bay in New England," to consist of thirteen persons "resydent upon the said plantation," who should "from tyme to tyme, and at all tyme hereafter, have the sole managing and ordering of the government and our affairs there," and "bee entytled by the name of the Governor and Councell of London's Plantation in the Mattachusetts Bay in New England;" "chose and elected the said Captaine John Endicott to the place of present governor in our said plantation" for one year after he should take his oath of office, (which was sent out to be administered to him in New England,) or until the Company should choose a successor; and authorized him and his council, or a majority of them, to fill vacancies in their board, and to elect a deputy governor, secretary and other officers. This order was confirmed on the 18th of May. 3 Archæol. Amer. 30 *f*, 30 *g*, 34, 38, 39; 1 Mass. Col. Rec. 37 *j*, 42, 361, 362.

The Company at the same time ordered (in the same words in which the law-making power had been conferred by the Colony Charter on the governor and general court, and nearly the same in which it was afterwards conferred on the legislature by the Province Charter and by the Constitution of the Commonwealth) that Endicott and his council should "have full power and authority to make, ordeyne and establish all manner of wholsome and resonable orders, laws, statuts, ordinances, directions and instructyons, not contrary to the lawes of the relme of England," adding, "for the present goverment of our plantation, and the inhabitants residinge within the lymitts of our plantation; a copy of all which orders is from tyme to tyme to bee sent the Company in England." 3 Archæol. Amer. 30 *h*, 40; 1 Mass. Col. Rec. 38, 363; Anc. Chart. 32, 33. Const. Mass. c. 1, § 1, art. 4.

These orders, and others giving general directions for the allotment of lands, were sent out to Governor Endicott and his council with a letter of May 28th. 1 Mass. Col. Rec. 44, 45, 398 *& seq.*; 3 Archæol. Amer. 37 & note, 96 *& seq.* As no records of Endicott's administration have been preserved, there is no direct evidence of the required oaths having been taken by him or his councillors. But it appears that he held councils and elections, made laws, granted lands and regulated the civil and religious affairs of the Colony. Bradford's Hist. Plym. 265, 266. N. Morton's New England Memorial (ed. 1826) 137, 147, 148. T. Morton's New English Canaan, 105, in 2 Force's Hist. Tracts. Edward Howes to John Winthrop, Jr., March 25th 1638, 29 Mass. Hist. Coll. 257. Hubbard's Hist. N. E. 104, 109, 114, 115, 122. 1 Mather's Magnalia, 18. Prince's N. E. Chronol.

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(ed. 1826) 260, 262. 1 Chalmers Amer. Col. 42. 3 Archæol. Amer. 52–54, note. 1 Mass. Col. Rec. 81, 408. Frothingham's Hist. Charlestown, 13, 21. 1 Palfrey's Hist. N. E. 294–299, 320. *Commonwealth* v. *Roxbury*, *ante*, 485, 489.

The right of the Company under the Charter to make this delegation of power has not been disputed, even by those who have doubted the validity of the subsequent transfer of the Company to America. 1 Hutchinson's Hist. Mass. 20, 366. 1 Chalmers Annals, 142. But it can hardly be supposed that the Company could or would surrender the whole legislative power to the government thus established by them in the Colony. Yet the form of the "oath of the governor in New England" (upon which Counsellor White's advice had been taken) omits the clause, which was in the oath of the governor of the Company, binding him to execute the statutes and ordinances of the Company, and simply says, "Statutes and ordinances shall you none make without the advice and consent of the councell for the government of the Mattachusetts Bay in New England." 1 Mass. Col. Rec. 39, 44, 349, 351, 399. 3 Archæol. Amer. 30 & 36, 40, 96, 97. The Company do not seem after this to have passed any orders in England for the government of the Colony; and the language used in their letters of instructions is rather that of suggestion than of command. 1 Mass. Col. Rec. 403, 405, 406, 407, 408. 3 Archæol. Amer. 54 note, 102, 105, 106, 107. Higginson and those who came over with him in 1629 "were all combined together into one body politicke under the same Governour." Higginson's New England Plantation (1629) 1 Mass. Hist. Coll. 123.

Some of the early narratives would lead us to suppose that the association had formed the purpose to come to America before they sent over Endicott. Johnson's Wonderworking Providence, c. 9, 12 Mass. Hist. Coll. 69. Hubbard's Hist. N. E. 109. But White, the earliest of all, says that "the good report of Captaine Endecott's government, and the encrease of the Colony, began to awaken the spirits of some persons of competent estates, not formerly engaged." Planter's Plea, 43, in 2 Force's Hist. Tracts. See also Governor Dudley's letter to the Countess of Lincoln, March 12th 1630–1, 8, Ibid. The first mention of the project in the records is under date of July 28th 1629, and is that Cradock, the governor of the Company, "read certain propositions conceived by himselfe," to wit, for reasons given, "to transferr the government of the plantation to those that shall inhabite there, and not to continue the same in subordination to the Company heere, as now it is;" and after repeated discussions, it was voted on the 29th of August "that the government and pattent should bee setled in New England, and accordingly an order to bee drawne upp." 1 Mass. Col. Rec. 49–51; 3 Archæol. Amer. 47–49. 4 Savage's Geneal. Dict. 609. On the 16th of October, after the transfer had been decided upon, but before the details had been arranged, the Company wrote a letter to "the Governor, Captaine Endicott," in which they gave no hint of the proposed change — perhaps only because they had not determined what to say to him about it; for at that meeting it was "conceived fitt that Captaine Endecott continue the government there, unless just cause to the contrarie." 1 Mass. Col. Rec. 56, 57, 409; 3 Archæol. Amer. 54 note, 59.

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At a general court held in London, on the 20th of October 1629, Governor Cradock, without formally resigning his office, "acquainted those present, that the espetiall occasion of summoninge this court was for the election of a new governor, depatie, and assistants, the government being to bee transferred into New England, according to the former order and resolution of the Company;" and John Winthrop (who had recently joined the Company, and with others signed an agreement on the 29th of August 1629 "to embarke for the said plantation by the first of March next," "provided always, that before the last of September next the whole government together with the patent for the said plantation be first by an order of court legally transferred and established to remain with us which shall inhabite upon the said plantation;") was "chosen to be governor for the ensuing yeare, to begin on this present day; who was pleased to accept thereof, and thereupon tooke the oath to that place appertaineing." And Cradock, Endicott and others were at the same time elected assistants. Hutchinson's Coll. 26. John Winthrop, Jr. to John Winthrop, August 21st 1629, 1 Winthrop's Hist. N. E. (3d ed.) Appendix, 432. 1 Mass. Col. Rec. 59, 60. 3 Archæol. Amer. xcix, 61–65 & note.

Winthrop sailed in the Arbella on the 29th of March 1630, arrived and was received by Endicott at Salem on the 12th of June. But his first official act in the Colony, so far as is known, (except the settlement of a difference between the captain and the passengers of another vessel,) was the marriage of his predecessor on the 18th of August. 1 Winthrop's Hist. N. E. 1–30. He may not have assumed the immediate government of the Colony sooner, because the year for which Endicott had been chosen had not expired; for, as above stated, Endicott had been chosen Governor of the Colony on the 30th of April 1629, for one year after he should take his oath of office and until a successor should be chosen; notice of this election did not leave England until the end of May; and to judge from the voyages of Endicott and Winthrop, the length of the passage was about three months, which would have brought him to about the middle of August 1629. But it has generally been assumed that Endicott's commission was superseded by Winthrop's arrival. 2 Winthrop's Hist. N. E. 25, Savage's note. 1 Felt's Annals of Salem, 157. *Shaw*, C. J., in *Commonwealth* v. *Roxbury*, *ante*, 487. And Winthrop was certainly known in the Colony from that time as "the Governor," and as such "entertained several publique persons;" while Endicott was called by the humbler title of "Captain," under which (either as the leader of the first band of colonists, or as having previously held military rank) he appears when first mentioned in the records, and which is used in the Charter, as a synonym, apparently, of "chief commander" or "governor" of the Colony by appointment of the Governor and Company. Bradford's Letter Book, 3 Mass. Hist. Coll. 74–76. Hubbard's Hist. N. E. 130, 131. 1 Mass. Col. Rec. 17, 25, 74. 1 N. E. Geneal. Reg. 203. *Ante*, 505.

By the Charter the time of the annual election of Governor of the Company was fixed on the last Wednesday of Easter term. Winthrop's election on the 29th of October 1629 was, somewhat irregularly, made for one full year from

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that day. 1 Mass. Col. Rec. 12, 59. Edward Johnson states that on the 23d of August 1630 "the first court" was holden on board Winthrop's ship the Arbella, and that Winthrop was then "chosen governour for the remainder of that year 1630." Wonderworking Providence, c. 17, 12 Mass. Hist. Coll. 67. This, not appearing on the records of the Company (in which there is a blank leaf between the meetings in England and Winthrop's first court of assistants in the Colony) has been doubted by some of the best authorities. Prince's N. E. Chronol. 314. 1 Winthrop's Hist. N. E. 30, Savage's note. 4 Savage's Geneal. Dict. 609. 1 Palfrey's Hist. N. E. 317, note. And it is very possible that Johnson may have erroneously taken this date from the first court of assistants (which had no power by the Charter to elect a governor) at Charlestown. But, unless some unrecorded election was had during this summer, Winthrop acted without authority (at least after the expiration in October of the year for which he had in terms been chosen) until the regular annual election in May 1631; for the records contain no evidence of any intermediate election. 1 Mass. Col. Rec. 59–87. At Winthrop's second court of assistants, "Captaine Endicott, havinge beene formerly chosen an assistant," was sworn as such — whether under his election in England in the previous October, or under some intermediate election, such as is mentioned by Johnson, does not appear. 1 Mass. Col. Rec. 90, 75. The duplicate charter, under which Endicott governed the Colony before Winthrop's arrival, is still preserved at Salem in the Athenæum library. The Charter brought over by Winthrop is in the State House at Boston. In 1629 Cradock addressed Winthrop by the same title which had been conferred on Endicott ten years before, *ante*, 506. 36 Mass. Hist. Coll. 128.

In later times the legality of the transfer of the government of the Company in America has been doubted by some authorities. 1 Hutchinson's Hist. Mass. 368 note, 366, 367. 1 Chalmers Annals, 139, 148. Robertson's Hist. Amer. c. 10. 1 Grahame's Hist. U. S. (Amer. ed.) 222. 1 Story on U. S. Const. §§ 64, 66. But the step was taken after serious consideration, and under the advice of John White, the counsellor, by whom the Charter had probably been drafted. Johnson's Wonderworking Providence, c. 7, 12 Mass. Hist. Coll. 63. Prince's N. E. Chronol. 254. 1 Hutchinson's Hist. Mass. 20. 3 Archæol. Amer. cvi. 1 Palfrey's Hist. N. E. 306, 307. The Charter contained no limitation of the place of holding "general courts," or "courts of assistants;" and expressly provided that it should be lawful for the Company at any time, "to take, leade, carry and transport" to the Colony any English subjects, or any strangers that would become such, "not by especiall name restrayned" by the king; and that the Charter should "be construed, repated and adjudged in all cases most favorably on the behalf and for the benefitt and behoofe of the saide Governor and Company and their successors." 1 Mass. Col. Rec. 13, 14, 19; Anc. Chart. 11, 17. If the "copy of the docquet of the grant" quoted by Chalmers (1 Annals, 147) limited them to England, the omission of that restriction in the Charter certainly had no tendency to perpetuate it. In September 1630, December 1632 and January 1633, the privy council passed orders for the benefit

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of the Company, with evident knowledge that the governor and the greater part of the assistants had left England. 1 Palfrey's Hist. N. E. 319 note, 365 & note. 2 Archæol. Amer. 50, note.

On the *quo warranto* brought by Sir John Banks as attorney general in 1635, service was made only upon the members remaining in England; and the judgment, rendered upon Matthew Cradock's default, was "that he should be convicted of the usurpation charged in the information, and that the liberties, privileges and franchises of the Company be seized into the king's hands." Hutchinson's Coll. 101–104; 1 Hazard's Hist. Coll. 101–104. This judgment was never treated, either in Massachusetts or in England, as a dissolution of the corporation. 1 Hutchinson's Hist. Mass. 89, 507. 1 Chalmers Annals, 162. 1 Palfrey's Hist. N. E. 403, 404, 556–559. In 1678 Sir William Jones and Sir Francis Winnington as attorney and solicitor general gave an opinion "that neither the *quo warranto* was so brought, nor the judgement thereupon so given, as could cause a dissolution of the said charter." 1 Chalmers Annals, 439. And see *The case of the City of London*, 8 Howell's State Trials, 1340 *& seq.*; St. 2 W. & M. sess. 1, *c.* 8; 4 Mod. 58; 12 Mod. 17, 18; 1 Show. 278, 279, 280; Mass. Hist. Soc. Proceedings 1859, 156–160.

In 1677 the two English chief justices, Rainsford and North, were of opinion that the Charter "made the adventurers a corporation upon the place." 1 Belknap's Hist. N. H. Appendix, xxxiv, xxxv. Sir William Jones, as attorney general, gave an opinion in 1679 upon the conflicting rights of the Massachusetts Colony, and of Mason, claiming under grants from the Council of Plymouth, in which he recognized that the Company "transported themselves and made a settlement upon the said lands" pursuant to the Charter; and advised that Mason's claim to lands within their jurisdiction was subject to the colony statute of limitations of 1657, if passed by an assembly duly constituted according to the Charter; and must be tried in the courts of the Colony, "liable to such appeal as the Charter allows, if it allows any." 1 Hutchinson's Hist. Mass. 284–287. 3 Mass. Col. Rec. 422. 4 Mass. Col. Rec. pt. I. 288. And Sir Robert Sawyer, his successor, (who obtained the judgment against the Charter in 1684 upon other grounds, and who was, as Mr. Hargrave says, "a great lawyer" and "in general an over devotee to the court and to prerogative,") gave an opinion that "the Patent having created the grantees, and their assigns, a body corporate, they might transfer their charter, and act in New England." 1 Chalmers Annals, 173. 32 Mass. Hist. Coll. 278. Pref. to Hale's Jurisdiction of the House of Lords, cxli, cxlii. And see 1 Bancroft's Hist. U. S. 345, 353; 3 Amer. Jurist, 238–241; *Commonwealth* v. *Alger*, 7 Cush. 66, 92, 93; *Commonwealth* v. *Roxbury*, *ante*, 480, 481.

Before the Colony Charter was obtained, "all men intendinge to goe in person or to send over" were required to sign an obligation "to bee tyed to such orders" for the division of lands in the Colony as should be agreed upon in England; and within two months after obtaining the Charter, a scheme was adopted for such an allotment of the lands as to promote the building of towns. 1 Mass.

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Col. Rec. 28, 43; 3 Archæol. Amer. 15, 35. *Commonwealth* v. *Roxbury*, *ante*, 484, 485. At Winthrop's second court of assistants, immediately following the order naming Boston, Dorchester and Watertown, cited *ante*, 485, "it is ordered that noe person shall plant in any place within the lymitts of this pattent without leave from the governor and assistants or the major parte of them," and those already settled at Agawam (afterwards Ipswich) were ordered to come away. 1 Mass. Col. Rec. 76. On the 22d of March 1630–1 the court of assistants ordered "every towne within this pattent" forthwith to provide arms for its inhabitants. 1 Mass. Col. Rec. 84. At first "the severall plantations" were repeatedly taxed as such by the court of assistants for public purposes. 1 Mass. Col. Rec. 77, 82, 89, 93, 103, 110. *Ante*, 459 note, 486. But on the 14th of May 1634 the powers of taxation and granting lands were declared to be in the general court only; and the towns were directed how to levy taxes, and authorized to choose deputies. 1 Mass. Col. Rec. 117, 118, 120. *Ante*, 460 note, 480, 481. 28 Mass. Hist. Coll. 202, 203. Taxes were afterwards laid upon towns by the general court. 1 Mass. Col. Rec. 129, 138, 149, 158, 165, 175. In May 1631 and June 1635 the general court required every town to provide standard weights and measures. 1 Mass. Col. Rec. 87, 148. On the 3d of September 1634 a committee of nine was appointed, to "sett out the bounds of all townes not yet sett out or in difference betwixte any townes," and provision made for its pay. 1 Mass. Col. Rec. 125, 127. In 1634–5 towns were ordered to maintain the captains of their companies, and to provide powder houses. 1 Mass. Col. Rec. 127, 138. On the 3d of September 1635 "it is agreed that hereafter noe dwelling howse shalbe builte above halfe a myle from the meeteing howse, in any newe plantation." 1 Mass. Col. Rec. 157; *Ante*, 489. On the 3d of March 1635–6 towns were directed to send ten armed men each to the general court; and were authorized "to demolishe howses," built "in any towne liberties, prejuditiall to the townes, without leave from the townes." 1 Mass. Col. Rec. 166, 168. And on the same day the order was passed, which is printed *ante*, 460, note, authorizing towns to grant lands, make by-laws and impose fines for their breach, and choose town officers. Similar orders were passed soon afterwards in the Plymouth Colony. 11 Plym. Col. Rec. 31–38; Plym. Col. Laws, (ed. 1836) 63–70. Towns were not expressly authorized to sue and be sued until 1694, nor formally incorporated until 1785. Prov. St. 6 W. & M., Anc. Chart. 279. *St.* 1785, *c.* 75, § 8. See 2 Dane Ab. 698; *Willard* v. *Newburyport*, 12 Pick. 229–231; *Spaulding* v. *Lowell*, 23 Pick. 77, 78; *Commonwealth* v. *Roxbury*, *ante*, 485, 495, 496, 500. The determination of the boundaries of towns, either by perambulation, by agreement between towns, or by the general court, did not affect the title to lands within their limits. *Porter* v. *Sullivan*, 7 Gray, 444, 450. *Commonwealth* v. *Roxbury*, *ante*, 495, 496, 501, 502.

On the 5th of July 1631 it was ordered, that "Conants Ileland, Noddles Ileland, Tompsons Ileland, togeather with all other ilelands within the lymitts of our pattent, shalbe appropriated to publique benefits and uses, and to remaine in the power of the governor and assistants (for the time being) to be lett and

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disposed of by them to helpe towards publique charges." 1 Mass. Col. Rec. 89. On the 3d of April 1632 "Conant's Ileland or Governor's Garden" (now Governor's Island) "with all the liberties and previlidges of fishing and fowleing," was granted to Governor Winthrop, he covenanting "to plant a vineyard and an orchyard in the same," and paying a certain annual rent, which was afterwards fixed at "a hogshead of the best wyne that shall grow there," and later at "two bushells of apples every yeare, one bushell to the governor, and another to the generall court in winter, the same to bee of the best apples there growing." 1 Mass. Col. Rec. 94, 139, 293, 301. In 1634–5 Long Island, Deer Island, Hogg Island and Spectacle Island were granted to the inhabitants of Boston, and Tompson's Island to the inhabitants of Dorchester, in fee, at certain annual rents. 1 Mass. Col. Rec. 115, 139. Noddle's Island, now East Boston, was granted in fee in 1633 at a yearly rent to Samuel Maverick, who had resided there before the arrival of Winthrop. 1 Mass. Col. Rec. 104. 1 Hutchinson's Hist. Mass. 26. It would seem that the order of 1640, declaring the flats to belong to that island, may have had reference to Maverick's title, rather than to the jurisdiction acquired under the intermediate order, by which "Nodles Island is layd to Boston." See orders of 1636–7 and 1640, *ante*, 465 note, 495.

The first indication of a division into counties is on the 3d of March 1635–6, when "it is ordered, that there shalbe four courts kept every quarter, 1, att Ipswich, to which Neweberry shall belonge; 2, att Salem, to which Sangus shall belonge; 3, at Newe Towne, to which Charlton, Concord, Meadford and Waterton shall belonge; 4th, att Boston, to which Rocksbury, Dorchester, Weymothe and Hingham shall belonge." 1 Mass. Col. Rec. 169. The four counties, into which the whole territory of the Massachusetts Colony was divided in 1643, seem to have received their names from their relative positions — Essex being the eastern, Middlesex in the middle, Suffolk the southern, and (old) Norfolk the northern. 2 Mass. Col. Rec. 88; *ante*, 464 note. Hampshire County was created in 1662. 4 Mass. Col. Rec. pt. II. 52. In 1680, so much of Norfolk, as had not in the mean time been set off to New Hampshire, was incorporated into Essex. 5 Mass. Col. Rec. 264. The Colony of Plymouth was divided into the counties of Plymouth, Barnstable and Bristol, by an act of 1685, before its annexation to Massachusetts by the Province Charter. Plym. Col. Laws, (ed. 1685) 20; (ed. 1836) 294, 295. The islands of Nantucket and Martha's Vineyard and adjacent islands, when transferred by that charter from New York to Massachusetts, constituted Duke's County, from which Nantucket was set off as a separate county in 1695 by Prov. St. 7 W. & M. Prov. Laws, (ed. 1726) 38; (ed. 1759) 62. Worcester County was created in 1730, Prov. St. 4 G. 2, Anc. Chart. 484; Berkshire in 1761, Prov. St. 1 G. 3, Anc. Chart. 638; Norfolk (new) in 1793, *St.* 1792, *c.* 72; Hampden in 1811, *St.* 1811, *c.* 61; and Franklin in 1812, *St.* 1811, *c.* 137. The boundaries of counties are coextensive with the limits of the Commonwealth, for all purposes not affected by the Constitution and laws of the United States. *Commonwealth* v. *Peters*, 12 Met. 387. *Commonwealth* v. *Alger*, 7 Cush. 82. *Dunham* v. *Lamphere*, 3 Gray, 272. *Common-*

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wealth v. *Roxbury*, *ante*, 494. Gen. Sts. c. 1, §§ 1, 2; c. 17, § 1. *Pollard* v. *Hagan*, 3 How. 230.

The Colony Charter vested in the government of the Colony both the right of property and the right of government in the sea shores and tide waters. 2 Dane Ab. 691. *Commonwealth* v. *Charlestown*, 1 Pick. 185. *Dill* v. *Wareham*, 7 Met. 445. *Weston* v. *Sampson*, 8 Cush. 353. *Commonwealth* v. *Alger*, 7 Cush. 65, 66, 81, 93. *Commonwealth* v. *Roxbury*, *ante*, 479, 481, 483, 492. But a grant of land from that government is not to be held to include the sea shore without clear words or necessary implication. *Commonwealth* v. *Roxbury*, *ante*, 493. The object of the only grant relied on by the defendants in this case seems to have been to define the inland boundaries and not those towards the shore. See *Bartlett*, *arguendo*, 471, 472, and records there cited; *Shaw*, C. J. *ante*, 487–490.

In 1639, Governor Winthrop says, "the people had long desired a body of laws, and thought their condition very unsafe while so much power rested in the discretion of magistrates." "Two great reasons there were, which caused most of the magistrates and some of the elders not to be very forward in this matter. One was, want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive that such laws would be fittest for us, which should arise *pro re nata* upon occasions, etc., and so the laws of England and other states grew, and therefore the fundamental laws of England are called customs, *consuetudines*. 2. For that it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we were assured we must do. But to raise up laws by practice and custom had been no transgression." "At length (to satisfy the people) it proceeded." 1 Winthrop's Hist. N. E. 322, 329. 28 Mass. Hist. Coll. 204–209. By *Shaw*, C. J. in *Commonwealth* v. *Alger*, 7 Cush. 71. And the Body of Liberties, the first code of laws of the Massachusetts Colony, was finally adopted in December 1641. These laws were not printed, but were published in manuscript under the superintendence of a committee of which Governor Endicott, then deputy governor, was chairman; and, Governor Winthrop says, "established for three years, by that experience to have them fully amended and established to be perpetual." 1 Mass. Col. Rec. 344, 346. 2 Winthrop's Hist. N. E. 55. At the next session of the general court, on the 20th of May 1642, "the lawes were read over." 2 Mass. Col. Rec. 9. And before the expiration of the three years committees were appointed to revise the Body of Liberties, and orders relating to it were passed every year afterwards until 1648. 2 Mass. Col. Rec. 39, 61, 109 128, 157, 168, 196, 209, 217, 227, 230, 239, 246, 262, 263. 3 Mass. Col. Rec. 6 26, 46, 74, 85, 125, 130, 142.

The next edition was printed late in 1648, or early in 1649. 2 Mass. Col. Rec. 263, 266. 3 Mass. Col. Rec. 162. "A coppy of the printed lawes," was among the papers "left in honnored Mr. Winthrop's study" at his death, which took place March 26th 1649. 3 Mass. Col. Rec. 179. Hull's Diary, 3 Archæol. Amer. 173. But no copy of this edition is known to be in existence. 28 Mass.

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Hist. Coll. 195. The reason of this may perhaps be found in a petition of Richard Russell, the Colony treasurer, on the 22d of May 1651, representing that "by the court's incoradgment" he had "purchased the last printed lawbookes, and by reason of the courts alteration of sume things in those bookes made them unvendible, insomuch that your petitioner lost above tenn pounds, a great part turned to waste papers, and many of them burnt;" upon which the general court "allowed him twenty pounds out of the next country rate." 58 Mass. Archives, fol. 18. 3 Mass. Col. Rec. 232. 4 Mass. Col. Rec. pt. I. 50. And in an order of May 14th 1659 the general court say, "The bookes of lawes, of the first impression, not being to be had for the supply of the country, putt us upon thoughts of a second." 47 Mass. Archives, 35.

The Body of Liberties did not determine or define the title in the sea shore between high and low water mark. But on the 4th of June 1644 the deputies appointed a committee "for to consider of the bill presented to the howse concerning mens proprieties, and to returne theire thaughts of the particulers therein exprest." 3 Mass. Col. Rec. 4. It may be conjectured that this bill was the original draft of the ordinance declaring the title of proprietors of land on the sea shore to extend to low water mark or one hundred rods, which is now well understood to have been passed not in 1641, but in 1647. 28 Mass. Hist. Coll. 215. *Shaw*, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 67, 68. Resolve of 1649, *ante*, 465 note.

In the earliest times of the Colony, before the passage of any ordinance on the subject, wharves were built by the proprietors of land bounding on the sea, by the permission or authority of the towns, and with the approval of the general court. The earliest order of this kind, appearing in the Boston town records, is one of January 21st 1638–9, by which "there is granted to the owners of the wharfe and crayne an hundred acres of land at Mount Woolystone, next to the allotments already graunted, towarde the repayring and mainteyening of the said wharfe and crayne." 1 Boston Town Rec. 27. On the 25th of May 1640, "Mr. Edward Ting is granted to digg turfe of the island lieing among the flats by the mill feild going to Charlestowne." 1 Boston Town Rec. 45. On the 6th of October 1641, "Francis Willoughby, Edward Tinge and Edward Bendall" presented a petition to the general court, representing that they "have beene att greate costs and charges, to the expense of a greate part of our estates in erecting warehouses and framing of wharfes with many other necessaryes, for expeditinge and safe landinge of such comodetyes and goods as come (not onelye from aboute home, but alsoe) from further partes, expedient and usefull accord" ing to our hopes and intentions for the publique good," and praying the court "to appoynte unto us a certaine rate for wharfage, porterage and howsing of goods; that having your worships authoretye for our demands and dues in this case by this honored corte provided, we may not (justlye) offende anye, by our owne demande." On this petition the general court appointed a committee "to settle rates of wharfage, porterage and warehouse huire, and certify at the next generall court, and the order to stand the meanewhile." 60 Mass. Archives, fol. 1.

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1 Mass. Col. Rec. 341. And see 2 Mass. Col. Rec. 170, 205; 3 Mass. Col. Rec. 82, 83. On the 29th of November 1641, the town granted to Valentine Hill "and to his associates" "all the wast ground (common highway and proprieties reserved) from the point of the marish betweene Mr. William Tynge's pales and John Lowe's howse there as it is now staked out, to the uppermost corner of Mr. Edward Tynge's proprietie neare the key already staked out, and so round by Edward Bendall's to the point forementioned, for so many yeares, as the charge they shall bestowe in purchase of their neighbours theire late wharfinge, and in building, making and repairing such wharfes, creekes, or coves, within this five yeares now next comming shall amount unto." &c.; with license "to take tunnage of all such vessells, and wharfage of all such goods, as shall there arrive or make use thereof during the sayd termes;" provided "that all such whose grounds doe butt on the wast grounds above granted or highwayes there, shall be free to import, land, and export, within this jurisdiction (except by way of merchandise) all their owne goods, wood, timber and other things being originally of this jurisdiction, without any charge;" and "such warehouses or other houses as they shall erect during their terme they shall be allowed for by the towne after such rate as they shall be valued to be there worth without respect of the place;" and "such wharfes, as they shall make there, they shall leave in good repaire, and so as they may be of use to the towne at the end of the time;" and also "sufficiently wharfe, and from time to time keepe in repaire the creeke next unto George Burden's house fitting for the lading and unlading of lighter of twenty tunne in ordinary tydes on eyther syde thereof;" and "provided also that if Mr. Edward Tynge shall within five yeares now next cominge wharf in that part of the waste betweene the inside of the crosse wall and Mr. Hill's wharfe end" he shall enjoy "the sole libertye of tunnage and wharfage by and upon the same, without contributing to any other charge." 1 Boston Town Rec. 56, 57. In the allotments of lands recorded in 1635 estates of Valentine Hill and others were bounded "by the common shore." 1 Boston Town Rec. 22. In 1643 and 1644 there were grants by the town of Boston to many a person of "liberty to wharf before his propriety." Boston Town Rec. *Wheeler* v. *Stone*, 1 Cush. 318.

The orders above quoted seem at least to prove a usage similar to that which was established in Rhode Island by a colonial statute in 1707, and has continued there to the present day; and which has also prevailed, without any express statute, in Connecticut and New Jersey; by which the proprietor of the upland, though he has no title below high water mark, may build wharves, and thus exclusively occupy the space between high and low water mark. Angell on Tide Waters, (2d ed.) 236, 237. 1 Swift's System, 341. *Chapman* v. *Kimball*, 9 Conn. 38. *Simons* v. *French*, 25 Conn. 346. *Gough* v. *Bell*, 1 Zab. 156; 2 Zab. 441; 3 Zab. 624. *State* v. *Jersey City*, 1 Dutcher, 525. *State* v. *Brown*, 3 Dutcher, 13. The main object of the Massachusetts Colony ordinance has always been understood to be to induce the erection of wharves for the benefit of commerce. *Storer* v. *Freeman*, 6 Mass. 438. *Commonwealth* v. *Charlestown*, 1 Pick. 183. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 24. And see *Dutton* v. *Strong*, 1 Black, 32.

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But there is some evidence which goes further, and tends to show that the towns, without any other legislative authority than might be derived from the act of March 3d 1635–6, (*ante*, 460 note, 511,) exercised the power of making absolute grants below high water mark. The right of towns to appropriate "fishing and fowling," at least, if not "bays, coves and rivers," was recognized in the ordinance of 1641, *ante*, 465 note. And their right to appropriate fish, if not appropriated by the legislature, has been affirmed by judicial decision, and called by Chief Justice Parsons a "rule of our common law." But towns have no right of property in fisheries within their limits; and their power ceases upon a regulation of the whole subject by the legislature. *Coolidge* v. *Williams*, 4 Mass. 144. *Randolph* v. *Braintree*, 4 Mass. 317. 2 Dane Ab. 700, 701, 706. *Dill* v. *Wareham*, 7 Met. 446. On the 31st of July 1643, the town of Boston granted to Henry Simons and others "and their parteners all that cove (already bounded) on the norwest side of the causey leading toward Charlestown, with all the salt marish bordering thereupon round about not formerly granted to any other (reserving liberty from time to time to make use of any part thereof for repayring the said causey) to have and enjoy the said cove and marish to them, and their heirs and assignes forever." 1 Boston Town Rec. 66. In 1828 the supreme judicial court, assuming that this grant was made after the passage of the ordinance annexing the flats to the upland, held that, in the absence of any proof of the bounds referred to, it passed the whole cove. *Rust* v. *Boston Mill Corporation*, 6 Pick. 166–170. On the 23d of March 1646, propositions were "presented to the townsmen on the behalfe of the inhabitants of the northend of the towne of Boston" for building a "fortification at Walter Merry's Point" upon certain terms, one of which was "that the ground nor flats before the sayd worke may not be disposed of by the towne unto any particular man's imploy to the prejudice of the said worke." And on the 30th of the same month "George Halsott is graunted liberty to set downe a cawsey ten foot square from his wharfe, at the northend of it, to low watter marke, and that passingers shall come and goe free to it." 1 Boston Town Rec. 79. A resolve of the general court in 1649 declared lands below high water mark, set apart by the inhabitants of a town for the purpose of thatching houses, not to be affected by the subsequent ordinance annexing the flats to the upland. *Ante*, 465 note.

In speaking of the common law of England, limiting the right of proprietors of land bounding upon tide waters to high water mark, it was assumed, without discussion, by *Shaw*, C. J., that, in this respect, (as was doubtless the case in most others,) "the first settlers of Massachusetts regarded the law of England as their law, and governed themselves by it." *Commonwealth* v. *Alger*, 7 Cush. 66, 94. But with all deference to so great an authority, it may be doubted, in view of the precedents just cited, whether the early settlers of Massachusetts thought of the peculiar title of the government in lands flowed by the tide, until they were led, in the framing of a code of laws, to determine the relative rights of the public and of individuals; or whether they then did anything more than to define and make certain a somewhat indefinite usage which had already grown

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up. So thought James Sullivan, who had been one of the first judges of the supreme judicial court after the Revolution. "From the first settlement of the Colony of Massachusetts," he says, "that government practised upon the principles of this provision." Sullivan on Land Titles, 285.

Chief Justice Parsons said that the rule established by the ordinance had by usage acquired "force as our common law;" and that the ordinance itself "was annulled with the Charter by the authority of which it was made." *Storer* v. *Freeman*, 6 Mass. 488. But the validity of the judgment against the charter in 1684 (founded on charges of having illegally levied taxes and duties, coined money, and imposed an oath of fidelity) was denied by the house of commons, and "questioned by very great authority in England," and was never admitted here. 32 Mass. Hist. Coll. 246–278. 1 Hutchinson's Hist. Mass. 347, 366. 1 Chalmers Annals, 415. 5 Mass. Col. Rec. 422–425, 439–441, 456–459, 466. By *Shaw*, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 76. The act of 1685, referred to *ante*, 466, and another act amending it, were passed after notice of the repeal of the Charter. 5 Mass. Col. Rec. 470, 473. And almost the last act of the last general court held under the Colony Charter was to appoint "a committee for a repository of such papers on file with the secretary as refer to our charter, and negotiations, from time to time, for the security thereof, with such as referr to our title of our land, by purchase of Indeans or otherwise." 5 Mass. Col. Rec. 516.

Andros indeed pretended that all grants of lands were avoided by the repeal of the Charter. 1 Hutchinson's Hist. Mass. 321, 322, 330. 2 Bancroft's Hist. U. S. 428. But after he was deposed, on the 22d of June 1689, "at the convention of the governour and council and representatives of the Massachusets Colony, it is declared that all the laws made by the Governour and Company of said colony, that were in force on the twelfth day of May one thousand six hundred eighty six (except any that are repugnant to the laws of England) are the laws of this colony, and continue in force till farther settlement, to which all inhabitants and residents here are to give due obedience." 3 Hutchinson Papers, 372, in Mass. Hist. Soc. Lib. This 12th of May was the first day of the political year, and before the arrival of the first royal commission after the repeal of the charter. 5 Mass. Col. Rec. 513, 516. 1 Hutchinson's Hist. Mass. 306.

The opinion expressed by Chief Justice Parsons upon the effect of the repeal of the Charter was probably derived from Judge Trowbridge, with whom he had studied. 7 Mass. 20. Knapp's Biog. Sketches, 42. Judge Trowbridge, as appears by his own manuscripts, (which have passed from his nephew, Chief Justice Dana, into the possession of the latter's grandson, Mr. Edmund Trowbridge Dana,) gave an opinion that rape was not entitled to the benefit of clergy by the laws of the Province, because the Prov. St. of 9 W. 3 did not make it a new felony, but only reaffirmed the law as it stood before, by the colony laws of 1649 and 1669, or the English Sts. of 18 & 25 Edw. 3 and 18 Eliz.; and added, "The old charter was vacated in 1686, and thereupon the laws of England revived here. If rape under the old charter should not be thought felony, not being absolutely punishable with death, yet as there was eleven years between

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the old charter and the making this act, must not the laws of England in that time revive, so as that rape within that time must be felony without clergy." See also Quincy, 53, note; 2 Hutchinson's Hist. Mass. 20.

The contrary opinion cannot be maintained, as Chief Justice Shaw was wont to do, by reference to the provincial statutes of May and November 1692 (4 W. & M.), continuing in force the colonial laws. Anc. Chart. 213, 229. 3 Amer. Jurist, 119, 120. *Barker* v. *Bates*, 13 Pick. 256. *Commonwealth* v. *Alger*, 7 Cush. 76, 77. For those acts were disallowed in England, under the power reserved in the Province Charter. Anc. Chart. 34. 2 Hutchinson's Hist. Mass. 18. A letter of December 26th 1695, signed by Lord Keeper Somers and other lords of the council, during the absence of King William in Holland, informed the governor and council of Massachusetts Bay that "it hath been thought fit to repeal both the said acts, it being judged necessary that in any new law to be enacted for the said purpose the laws to be continued be therein expressed and particularly specified." New England Board of Trade Entry Book, No. 35, fol. 200, in State Paper Office in London. This letter was received by the governor and council on the 13th of July 1696. Copies of Council Rec. 1696, fol. 403, in Office of Secretary of the Commonwealth. And the acts so repealed were omitted in all subsequent editions of the province laws, beginning with that of 1699.

But there was nothing in the repeal of the Colony Charter, or in the Province Charter, or in any intermediate proceedings, to reduce Massachusetts to the condition of a newly conquered country, in which alone has it ever been even pretended that private rights are affected by a change in the form of government. *Campbell* v. *Hall*, Cowp. 208 *& seq.* *United States* v. *Percheman*, 7 Pet. 86, 87. *Commonwealth* v. *Alger*, 7 Cush. 76. 3 Amer. Jurist, 118, 119. And see 1 Hutchinson's Hist. Mass. 316, 317. The Province Charter expressly confirmed all grants of lands made by the general court of the Colony. Anc. Chart. 26, 27; *ante*, 466. George Chalmers, who had access to the public documents in England, wrote that on the arrival of Governor Phipps with the Province Charter "the change which was made was scarcely perceptible, almost the same men were continued in power, the laws and customs of former times were continued." 2 Chalmers Annals, MS. And by the Constitution of Massachusetts, *c.* 6, art. 6, "all the laws which have been adopted and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law" are expressly continued in force. And see 3 Amer. Jurist, 119.

The colony ordinance of 1647 was not a mere revocable license, but a grant of title, sufficient to support a writ of entry, or an action of trespass *quare clausum fregit*. 2 Dane Ab. 694. *Austin* v. *Carter*, 1 Mass. 231. *Commonwealth* v. *Alger*, 7 Cush. 70, 71, 79, 80, 81. *Porter* v. *Sullivan*, 7 Gray, 443, 445, 449. *Boston* v. *Lecraw*, 17 How. 432, 438. The Commonwealth retains no title or easement in the flats so granted, unless it owns the upland; but its grant of a mere easement over flats does not release its title in them. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 21. *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 43. *Commonwealth* v. *Roxbury*, *ante*, 499.

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The owner of flats may, unless prohibited by the legislature, reclaim them, by building wharves or otherwise, so as to exclude navigation, provided he does not wholly cut off his neighbors' access to their houses or lands. *Commonwealth* v. *Pierce*, (1790,) 2 Dane Ab. 696. *Austin* v. *Carter*, 1 Mass. 231. *Storer* v. *Freeman*, 6 Mass. 435. 2 Dane Ab. 700. *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 106. *Commonwealth* v. *Alger*, 7 Cush. 75, 79, 81. *Deering* v. *Long Wharf*, 25 Maine, 65. *Low* v. *Knowlton*, 26 Maine, 132. Or he may plant stakes thereon, even to the obstruction of the public right of fishing. *Locke* v. *Motley*, 2 Gray, 266. Towns and cities have like rights in flats owned by them. *Coolidge* v. *Williams*, 4 Mass. 144. 2 Dane Ab. 706. *Richardson* v. *Boston*, 19 How. 269; 24 How. 193. But the omission of the owner of flats to inclose them, and their use for navigation, or for landing wood and other articles, do not prove a dedication to the public. *Boston* v. *Lecraw*, 17 How. 435. *State* v. *Wilson*, 42 Maine, 26. *Green* v. *Chelsea*, 24 Pick. 80. Evidence of possession of a seashore by individual inhabitants of a town, is no evidence of a right in the town. *Sale* v. *Pratt*, 19 Pick. 197. *Green* v. *Chelsea*, 24 Pick. 79.

All persons have the right to use uninclosed flats for the purposes of navigation. *Drake* v. *Curtis*, 1 Cush. 418. *Commonwealth* v. *Alger*, 7 Cush. 74, 75, 79, 88, 89. *Boston* v. *Lecraw*, 17 How. 433, 434. *Deering* v. *Long Wharf*, 25 Maine, 65. *Gerrish* v. *Union Wharf*, 26 Maine, 392. Tide waters, capable of sustaining vessels of any description with their loading, for purposes really useful to trade or navigation, at any state of the tide, cannot be obstructed with dams, highways or bridges, without authority of the legislature. *Dunbar* v. *Vinal* (1801) Sullivan on Land Titles, 286, 287; 2 Dane Ab. 695, 696. *Commonwealth* v. *Coombs*, 2 Mass. 492. *Arundel* v. *McCulloch*, 10 Mass. 71. *Commonwealth* v. *Charlestown*, 1 Pick. 184–188. *Keen* v. *Stetson*, 5 Pick. 494, 495. *Rowe* v. *Granite Bridge*, 21 Pick. 347. *Charlestown* v. *County Commissioners*, 3 Met. 202. *Marblehead* v. *County Commissioners*, 5 Gray, 252. *Commonwealth* v. *Roxbury*, *ante*, 495. *Richardson* v. *Boston*, 19 How. 269. But the legislature of the Commonwealth may authorize a bridge across tide waters. *Commonwealth* v. *Breed*, 4 Pick. 463. *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339. It is tide water wherever the ebb and flow of the tide is felt, whether the water is salt or fresh. *The King* v. *Smith*, 2 Doug. 444. *Peyroux* v. *Howard*, 7 Pet. 343. *Lapish* v. *Bangor Bank*, 8 Greenl. 85. After flats have been filled up by the owner, the consent of the legislature is not necessary to the location of a highway over the land. *Henshaw* v. *Hunting*, 1 Gray, 219. A town or city cannot lay out a highway for boats or vessels on tide water, even over flats owned by itself in fee. *Richardson* v. *Boston*, 24 How. 194, 195. As to the power of a town or city to fill up a creek to remove a nuisance, see *Baker* v. *Boston*, 12 Pick. 183.

The legislature may without compensation prohibit taking gravel from a beach, or building upon flats, whenever in their opinion such prohibition would benefit navigation. *Commonwealth* v. *Tewksbury*, 11 Met. 55. *Commonwealth* v. *Alger*, 7 Cush. 92–104. *Boston* v. *Lecraw*, 17 How. 433. They may authorize

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a mill corporation to exclude water from flats to maintain a tide mill, making reasonable compensation; *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467; and, on compensating such corporation, may take the basin so formed by the tide mill for other public improvements. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360. Such exclusion of the tide water does not affect the title to lands in the basin. *Commonwealth* v. *Roxbury*, *ante*, 456, 499. The mill acts do not apply to tide mills. *Murdock* v. *Stickney*, 8 Cush. 113. And see *Cogswell* v. *Essex Mill Corporation*, 6 Pick. 94.

On the laying out of a railroad over flats, the damages thereby occasioned to an adjacent wharf may be recovered by its owner. *Ashby* v. *Eastern Railroad*, 5 Met. 371, 372. So may the expense of raising other flats, rendered necessary by the building of the railroad to enable the owner to enjoy them. *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 58. But the expenses of structures necessary to protect land from the effect of a change in the currents of tide water by the erection of a drawbridge are too remote. *Fitchburg Railroad* v. *Boston & Maine Railroad*, 3 Cush. 88. The fact that a railroad is laid out over tide water does not preclude a claim for compensation for the construction of another railroad across its track. *Grand Junction Railroad* v. *County Commissioners*, 14 Gray, 565. A city, constructing a drain discharging into tide water in such a manner as to cause accumulations at the end of a wharf and impede the access of vessels thereto, is liable for the damages so occasioned. *Richardson* v. *Boston*, 19 How. 270.

The owner of flats has no right, either against the Commonwealth or against coterminous proprietors, to have his flats kept open for the ebb and flow of the tide, either for tide mills or for navigation; but only to the flow of the water below low water mark, and to some access thereto. *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 105, 106. *Brightman* v. *Fairhaven*, 7 Gray, 271. *Boston* v. *Lecraw*, 17 How. 436. *Richardson* v. *Boston*, 19 How. 269. The Commonwealth still owns the flats below the limit of the ordinance; and the erection of a wharf upon them without authority is a nuisance, at least if it obstructs navigation. *Commonwealth* v. *Pierce*, (1790) 2 Dane Ab. 696. *Commonwealth* v. *Crowninshield*, (1796) Sullivan on Land Titles, 286; 2 Dane Ab. 697. *Commonwealth* v. *May*, (1803) 3 Amer. Jurist, 190 note. *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 466. *Commonwealth* v. *Alger*, 7 Cush. 92. *Commonwealth* v. *Roxbury*, *ante*, 497. *Commonwealth* v. *Wright*, 3 Amer. Jurist, 185; Thach. C. C. 211. But such flats may be granted by the legislature, and a statute authorizing the extension of a wharf over them is an irrevocable grant. *Fitchburg Railroad* v. *Boston & Maine Railroad*, 3 Cush. 87.

What is high water mark has never been adjudged in this commonwealth. But it would seem to be the ordinary high tide. *Storer* v. *Freeman*, 6 Mass. 439. *Commonwealth* v. *Charlestown*, 1 Pick. 182. *Porter* v. *Sullivan*, 7 Gray, 443. *Commonwealth* v. *Roxbury*, *ante*, 477, 482, 491. *St.* 1814, *c.* 89, § 2. Hale *de Jure Maris*, in Hargrave's Tracts, 12, 25, 26. *Blundell* v. *Catterall*, 5 B. & Ald 290. *Lowe* v. *Govett*, 3 B. & Ad. 863. *Attorney General* v. *Chambers*, 4 DeGex,

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Macn. & Gord. 218. *Cortelyou* v. *Van Brandt*, 2 Johns. 362. *Galveston* v. *Menard*, 23 Tex. 399. Yet the low water mark intended by the ordinance is not the ordinary ebb, but where the tide ebbs the lowest, because there it may be most important to extend a wharf. *Sparhawk* v. *Bullard*, 1 Met. 97, 107. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 22. *Gerrish* v. *Union Wharf*, 26 Maine, 395, 396, *contra*. A boundary "by low water mark" is sufficiently certain in a verdict upon a writ of right. *Adams* v. *Frothingham*, 3 Mass. 357, 364. Upon a gradual change in the channel of a river, the increase, whether arising from natural causes, or from a combination of natural and artificial causes, belongs to the owner of the land or flats to which it is attached. *Commonwealth* v. *Pierce*, 2 Dane Ab. 696. *Adams* v. *Frothingham*, 3 Mass. 363. *Dunlap* v. *Stetson*, 4 Mason, 366, 367. If thatch islands, covered with water at ordinary flood tides, carry with them any title in the flats adjoining, it is only towards low water mark. *Thornton* v. *Foss*, 26 Maine, 404, 405. Islands formed below low water mark belong to the Commonwealth. *Hopkins Academy* v. *Dickinson*, 9 Cush. 550. *Middletown* v. *Sage*, 8 Conn. 228.

The ordinance applies to the shores of the open sea, as well as to creeks, coves or rivers. *Barber* v. *Bates*, 13 Pick. 255. *Sale* v. *Pratt*, 19 Pick. 197. *Commonwealth* v. *Alger*, 7 Cush. 76. The words "riparian proprietor" have been heedlessly extended from rivers and streams to the shores of the sea. If it is necessary to express it by a single adjective, the term "littoral proprietor," as used by the plaintiff's counsel in *Commonwealth* v. *Roxbury*, *ante*, 472, and by the supreme court of the United States in *Boston* v. *Lecraw*, 17 How. 432, 433, is more accurate.

The difficulty of applying the rule of the ordinance to the conflicting claims of coterminous proprietors was perceived very early. In 1683 the following question was presented (by whom does not appear) to the general court: "In regard the law entituled Libertys common doth give to all that border upon highwater mark the flats lying before their land downe to low water mark. Hence Query. When soverall proprietors have land bordering upon a cove which is more than a semicircle. Q. Whether a line from the circumference to the center of the semicircle ought not be the bounds to each mans propriety, and not low water mark." By a plan annexed the question would appear to have arisen in Braintree. The magistrates thereupon on the 17th of May 1683 passed the following act, which however was not consented to by the deputies: "For further explanation of the law granting to all proprietors of lands butting upon the salt water interest in the flatts to low water mark. Resolved upon the question, That where lands are so circumstanced as that to continue their bounds on strait lines to the lower water mark would unavoidably interfere one with another, the flats adjacent to low water mark shall be divided in proportion to each proprietors breadth upon high water mark: Provided alwayes this act of the court shall not be construed to disturb any orderly settlement formerly made." 47 Mass. Archives, 54.

The general rules for the division of flats among coterminous proprietors, so far as they can be ascertained from the adjudged cases, may be thus stated:

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1st. The intention of the ordinance was, "if practicable, to give to every proprietor the flats in front of his upland, of equal width with his lot at low water mark." *Wilde*, J., in *Gray* v. *Deluce*, 5 Cush. 12. And see *Dearfield* v. *Arms*, 17 Pick. 45. Whether the proprietor of upland, even if bounding on a cove, can claim flats in any other direction than towards low water mark has not been adjudged. The late Chief Justice Shaw and Mr. Samuel Hoar, sitting as referees, awarded that he could; Chief Justice Parker and Mr. Justice Wilde were of opinion that he could not. *Jones* v. *Boston Mill Corporation*, 6 Pick. 151, 156 *Rust* v. *Boston Mill Corporation*, 6 Pick. 161, 167. And see *Thornton* v. *Foss*, 26 Maine, 405.

2d. The nearest channel from which the tide never ebbs, though not adapted to navigation, is the limit. *Sparhawk* v. *Bullard*, 1 Met. 107. *Ashby* v. *Eastern Railroad*, 5 Met. 370. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 22, 24. *Attorney General* v. *Boston Wharf*, 12 Gray,

3d. The direction of the side lines of the flats is not governed by that of the side lines of the upland. *Rust* v. *Boston Mill Corporation*, 6 Pick. 169. *Piper* v. *Richardson*, 9 Met. 158. *Curtis* v. *Francis*, 9 Cush. 438, 442. *Emerson* v. *Taylor*, 9 Greenl. 43. Unless expressly so agreed by the parties. *Dawes* v. *Prentice*, 16 Pick. 442.

4th. Where there is no cove or headland, a straight line is to be drawn according to the general course of the shore at high water, and the side lines of the lots extended at right angles with the shore line. *Sparhawk* v. *Bullard*, 1 Met. 106. *Porter* v. *Sullivan*, 7 Gray, 448. *Dearfield* v. *Arms*, 17 Pick. 45, 46. *Knight* v. *Wilder*, 2 Cush. 210.

5th. Around a headland, the lines dividing the flats must diverge towards low water mark. *Wilde*, J., in *Gray* v. *Deluce*, 5 Cush. 12, 13. *Shaw*, C. J., in *Porter* v. *Sullivan*, 7 Gray, 448. *Emerson* v. *Taylor*, 9 Greenl. 46.

6th. In a shallow cove, in which there is no channel, a base line may be run across the mouth of the cove, and parallel lines drawn, at right angles with the base line, from the ends of the division lines of the upland to low water mark. *Gray* v. *Deluce*, 5 Cush. 12, 13. *See Attorney General* v. *Boston Wharf*, 12 Gray,

7th. A deep cove, out of which the tide entirely ebbs at low water, is to be divided by drawing a line across its mouth, giving to each proprietor a width upon the base line proportional to the width of his shore line, and then drawing straight converging lines from the divisions at the shore to the corresponding points on the base line. This rule (which is substantially that suggested by the magistrates in 1683, *ante*, 521,) was first revived by *Wilde*, J., in the hypothetical case of a cove the circumference of which was twice its diameter, or deeper than a semicircle. *Rust* v. *Boston Mill Corporation*, 6 Pick. 167, 168. It has since been acted upon in other cases, the reports of which contain no plan or description of the proportions of the coves in question. *Sparhawk* v. *Bullard*, 1 Met. 107. *Wheeler* v. *Stone*, 1 Cush. 323. And see *Ashby* v. *Eastern Railroad*, 5 Met. 369, 370; *Dearfield* v. *Arms*, 17 Pick. 45, 46.

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8th. The direction of the side lines of flats in a cove may be modified by the course of the channel bounding them, or by the position of other channels between part of that channel and the upland. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 22, 23, 24. *Commonwealth* v. *Alger*, 7 Cush. 69. *Porter* v. *Sullivan*, 7 Gray, 448, 449. *Attorney General* v. *Boston Wharf*, 12 Gray,

9th. It seems, that after passing the mouth or narrowest part of a cove, the lines may diverge, if necessary to preserve the proportions of different estates. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 25.

10th. An agreement of coterminous proprietors as to the direction of their boundaries may be proved, or presumed from their acts and those of public authorities. *Sparhawk* v. *Bullard*, 1 Met. 95. *Curtis* v. *Francis*, 9 Cush. 442, 460, 463, 466. *Adams* v. *Boston Wharf*, 10 Gray, . *Attorney General* v. *Boston Wharf*, 12 Gray, . *Rider* v. *Thompson*, 28 Maine, 243. *Treat* v. *Chipman*, 35 Maine, 34. Thus the lines of the flats at the foot of Summer Street in Boston have been repeatedly found by juries, under the instructions and with the approval of the court, to be parallel with the line of that street as established by the selectmen about 1668. *Valentine* v. *Piper*, 22 Pick. 95, 96. *Piper* v. *Richardson*, 9 Met. 162. *Drake* v. *Curtis*, 9 Cush. 447 note. In the large cove to the northward of that street, the flats were distributed according to an agreement made in 1678 for the erection of a barricade against the Dutch; but the legal effect of that agreement has never been judicially ascertained. *Brimmer* v. *Long Wharf*, 5 Pick. 135, 138. *Wheeler* v. *Stone*, 1 Cush. 319, 320. *Commonwealth* v. *Alger*, 7 Cush. 78. Colony Law of 1681, 5 Mass. Col. Rec. 310, 311. Bowditch on Flats, 4.

The ordinance of 1647 has been extended by usage to Plymouth, to Nantucket and Dukes County, and to Maine, although none of these were under the jurisdiction of Massachusetts when it was made. Sullivan on Land Titles, 285. *Barker* v. *Bates*, 13 Pick. 258, 260. *Mayhew* v. *Norton*, 17 Pick. 357. *Storer* v. *Freeman*, 6 Mass. 435. 2 Dane Ab. 701. *Codman* v. *Winslow*, 10 Mass. 146. *Lapish* v. *Bangor Bank*, 6 Greenl. 93, 93. *Weston* v. *Sampson*, 8 Cush. 354. *Commonwealth* v. *Alger*, 7 Cush. 76. *Moulton* v. *Libbey*, 37 Maine, 485.

The rule which has been adopted in Maine for the division of flats among coterminous proprietors, in the absence of any agreement between them, or any adverse possession, is to draw a base line between the two corners of each lot at the shore, and then run a line from each corner, at right angles with the base line, to low water mark; and, if the side lines diverge from or conflict with each other, to divide equally between the two proprietors the land excluded or included by both lines; and not to allow any subdivision of lots to change the side lines as required by an earlier division of the upland. How this rule should be applied in a cove so deep as to bring more than two of such side lines into conflict with each other has never been decided. *Emerson* v. *Taylor*, 9 Greenl. 42. *Kennebec Ferry* v. *Bradstreet*, 28 Maine, 374. *Treat* v. *Chipman*, 35 Maine, 36. *Call* v. *Lowell*, 40 Maine, 31.

Seisin of flats follows the legal title, unless an exclusive possession is proved

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Codman v. *Winslow*, 10 Mass. 151. *Brimmer* v. *Long Wharf*, 5 Pick. 135. *Rust* v. *Boston Mill Corporation*, 6 Pick. 171. *Wheeler* v. *Stone*, 1 Cush. 317. Disseisin of flats may be effected by filling them up, or by building a wharf on them and laying vessels at the end of it. *Rust* v. *Boston Mill Corporation*, 6 Pick. 158. *Wheeler* v. *Stone*, 1 Cush. 315, 322. And see *Treat* v. *Chipman*, 35 Maine, 34. But such use of flats adjoining a wharf does not necessarily exclude their use by others. *Gray* v. *Bartlett*, 20 Pick. 192. *Deering* v. *Long Wharf*, 25 Maine, 65. Sailing over uninclosed flats, when covered by the tide, will not constitute disseisin. *Brimmer* v. *Long Wharf*, 5 Pick. 139. *Drake* v. *Curtis*, 1 Cush. 415–419. *Curtis* v. *Francis*, 9 Cush. 466. Nor will occasionally cutting grass on them. *Commonwealth* v. *Roxbury*, *ante*, 499. *Thornton* v. *Foss*, 26 Maine, 404. Yet see *Clancey* v. *Houdlette*, 39 Maine, 457.

Since the passage of the ordinance, a grant of land bounding on the sea shore carries the flats, in the absence of excluding words. 2 Dane Ab. 691, 699. *Valentine* v. *Piper*, 22 Pick. 94. *Drake* v. *Curtis*, 1 Cush. 413. But the owner may sell either flats or upland separately. 2 Dane Ab. 699, 701. *Storer* v. *Freeman*, 6 Mass. 439. *Mayhew* v. *Norton*, 17 Pick. 357. *Commonwealth* v. *Alger*, 7 Cush. 80. *Porter* v. *Sullivan*, 7 Gray, 445, 447. *Lapish* v. *Bangor Bank*, 8 Greenl. 91. *Deering* v. *Long Wharf*, 25 Maine, 64. Flats may pass as appurtenances of a wharf, or a messuage. 2 Dane Ab. 690, 700, 701. *Doane* v. *Broad Street Association*, 6 Mass. 333, 334. *Ashby* v. *Eastern Railroad*, 5 Met. 369. *Jackson* v. *Boston & Worcester Railroad*, 1 Cush. 580. *Commonwealth* v. *Alger*, 7 Cush. 80. Doubtful words are to be taken most strongly against a private grantor. *Adams* v. *Frothingham*, 3 Mass. 361. *Saltonstall* v. *Long Wharf*, 7 Cush. 201. *Winslow* v. *Patten*, 34 Maine, 25. Otherwise, in public grants. *Commonwealth* v. *Roxbury*, *ante*, 490.

The general principle is, that a boundary by the tide water passes the flats, but a boundary by the land under the water excludes them. Thus flats are included in a grant bounded "by the harbor," *Mayhew* v. *Norton*, 17 Pick. 359; "by the sea or salt water," *Green* v. *Chelsea*, 24 Pick. 77; "by the sea," *Jackson* v. *Boston & Worcester Railroad*, 1 Cush. 478; *Saltonstall* v. *Long Wharf*, 7 Cush. 200; "by the creek," *Harlow* v. *Fisk*, 12 Cush. 302; "on the stream," *Lapish* v. *Bangor Bank*, 8 Greenl. 92, 93; or "river," *Moore* v. *Griffin*, 22 Maine, 350; or "bay," *Partridge* v. *Luce*, 36 Maine, 19. On the other hand, "by the shore," *Storer* v. *Freeman*, 6 Mass. 439; or "beach," *Niles* v. *Patch*, 13 Gray, 257; or "flats," *Parsons*, C. J., in *Storer* v. *Freeman*, 6 Mass. 439; *Fletcher*, J., in *Saltonstall* v. *Long Wharf*, 7 Cush. 200; excludes the flats. See also *Dunlap* v. *Stetson*, 4 Mason, 366; *Lapish* v. *Bangor Bank*, 8 Greenl. 90. But the effect of such general words may be controlled by specific monuments or abuttals. *Storer* v. *Freeman*, 6 Mass. 440, 441. *Chapman* v. *Edmands*, 3 Allen, 514. Yet a specific abuttal must yield, if contrary to the intention apparent upon the whole deed. *Jackson* v. *Boston & Worcester Railroad*, 1 Cush. 579. A boundary "by a way," *Codman* v. *Winslow*, 10 Mass. 149; "by the marsh," *Rust* v. *Boston Mill Corporation*, 6 Pick. 166; or "by a cliff," *Baker*

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v. *Bates*, 13 Pick. 256, 261, excludes the flats beyond. A private grant, "on the sea or flats," or "by the sea or beach," being ambiguous, passes the flats. *Saltonstall* v. *Long Wharf*, 7 Cush. 195. *Doane* v. *Willcutt*, 5 Gray, 335. "Harbor" or "flats" is a monument, which governs courses and distances. *Mayhew* v. *Norton*, 17 Pick. 359. *Curtis* v. *Francis*, 9 Cush. 435–440, 465. And see *Brimmer* v. *Long Wharf*, 5 Pick. 135, 139. The court will take into consideration the situation of the parties, the state of the country, and of the thing granted, at the time, in order to ascertain the intent of the parties. *Adams* v. *Frothingham*, 3 Mass. 352. *Commonwealth* v. *Roxbury*, *ante*, 493. *Rider* v. *Thompson*, 23 Maine, 244. A proprietary grant in 1680 of "a piece of land below high water mark, to set a shop upon, not exceeding forty feet in width," extended to low water mark, if within the hundred rods. *Adams* v. *Frothingham*, 3 Mass. 352. But a grant of a "thatch bank" below high water mark does not pass the flats towards low water mark, upon which no thatch grows. *Lufkin* v. *Haskell*, 3 Pick. 359. A description of flats as bounded on one side upon a way estops the grantor to deny that there is such a way, but is not a covenant against the acts of third persons. *Parker* v. *Smith*, 17 Mass. 413. *Howe* v. *Alger*, 4 Allen, 206.

Among the rights granted to the Massachusetts Company by the Charter were "free libertie of fishing in or within any the rivers or waters within the boundes and lymites aforesaid, and the seas thereunto adjoining; and all fishes, royal fishes, whales, balan, sturgions, and other fishes, of what kinde or nature soever." 1 Mass. Col. Rec. 7, 8; Anc. Chart. 5. 2 Dane Ab. 688. 2 Chalmers Opinions, 131. In 1645 an "auditor generall," was appointed, and directed, among other things, to "take notice and looke after wafts, strayes, goods lost, shipwrecks, whales, &c., or any such things of the like nature where the particular owner is not knowne, and the country may claim a priviledge in or common right unto." 2 Mass. Col. Rec. 143. 3 Mass. Col. Rec. 55. In the Plymouth Colony, drift whales cast ashore, or floating within a mile, belonged to the town; at sea, beyond those bounds, half to the Colony, and half to the finder. 11 Plym. Col. Rec. 62, 133, 134, 208; Plym. Col. Laws, (ed. 1685) 30; (ed. 1836) 97, 133, 135, 282. In Nantucket, rights to drift whales were reserved in deeds from Indian proprietors as early as 1658, and in a patent from James 2 in 1687. Hough's Nantucket Papers, 18 note, 132.

In 1632, the exclusive right of catching fowl upon "Pullen Poynte or Nodles Iland" was granted to John Perkins, and Conant's or Governor's Island, "with all the liberties and privileges of fishing and fowling," to Governor Winthrop. 1 Mass. Col. Rec. 94, 139, 293, 301. In 1634 a grant was made to Israel Stoughton by the general court, confirming a grant from the town of Dorchester in the previous year, of a mill right and a several fishery near the mouth of the Neponset River. 1 Mass. Col. Rec. 114, 128. *Stoughton* v. *Baker*, 4 Mass. 527. *Commonwealth* v. *Alger*, 7 Cush. 99, 100. In June 1641, "it is ordered that a plantation for the furtherance of fishing shall forthwith bee set up at Nantascot, and that all the neck to the furtherest end towardes Hingham where the tide

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overfloweth shall belong to it." 1 Mass. Col. Rec. 326. The rights acquired under such grants were expressly reserved in the sixteenth article of the Body of Liberties, *ante*, 465 note. In Massachusetts, rivers are deemed navigable so far as the tide ebbs and flows; and above that point the right of fishing is in the riparian proprietor, subject however, like such rights acquired under legislative grant, and all other rights of fishing, either in the sea or in rivers, to regulation by the legislature, so as to prevent the obstruction of the passage of fish, in all cases where previous statutes do not amount to a contract with parties obstructing the river. Sullivan on Land Titles, 285, 286. 2 Dane Ab. 695, 696, 703-707, 710. *Stoughton* v. *Baker*, 4 Mass. 522. *Nickerson* v. *Brackett*, 10 Mass. 212. *Commonwealth* v. *Chapin*, 5 Pick. 199. *Dunham* v. *Lamphere*, 3 Gray, 268. *Commonwealth* v. *Essex Co.* 13 Gray, 247, 248. *Cottrill* v. *Myrick*, 3 Fairf. 222, 230. *Fuller* v. *Spear*, 14 Maine, 418. *Lunt* v. *Hunter*, 16 Maine, 11. *Peables* v. *Hanaford*, 16 Maine, 108. *Preble* v. *Brown*, 47 Maine, 286.

The title to the flats seems to have been deemed before the Revolution to carry with it the right to the shellfish growing thereon. *Ipswich Proprietors* v. *Herrick*, (1772,) *post*, 529. It is true that the special verdict in that case found that the premises had been "possessed and improved" by the plaintiffs for more than twenty years. But the only acts of possession or improvement shown by the evidence, or indeed of which the premises, while uninclosed, were capable, was making annual leases thereof. Mr. Dane says, "By our law, fisheries, taking oysters, digging clams in flats-grounds, &c. are incorporeal hereditaments, that may be appurtenant to lands and territories." "Many parts of our flats-ground, and the rights of sea manure, &c. on them, belong to proprietors in common and undivided." 2 Dane Ab. 690, 697. But he does not seem to have been very clear in his views about taking shellfish, sometimes classing it with "digging sand and sea manure," sometimes with "fishing and fowling," and sometimes with both. 2 Dane Ab. 694, 699, 702, 705.

Long since the Revolution, taking clams on the sea shore was recognized as the subject of a several fishery. *Brown* v. *Lakeman*, 15 Pick. 151. *Lakeman* v. *Butler*, 17 Pick. 436. The first adjudication to the contrary in this commonwealth was in 1849. *Weston* v. *Sampson*, 8 Cush. 351. That case arose in the county of Plymouth, to which the Massachusetts colony ordinances *proprio vigore* did not extend, and where fishing and fowling had been declared to be free from the earliest times. Ordinances 1627-1685, 11 Plym. Col. Rec. 5, 16, 114, 198; Plym. Col. Laws, (ed. 1685) 37; (ed. 1836) 30, 34, 282, 324. Yet the decision was not based upon that distinction, but upon the ground that the public right of fishing, reserved by the colony ordinances, extended to shellfish as well as to swimming fish.

The same doctrine, upon similar grounds, has been repeatedly declared in Maine. But it seems never to have been necessary to a decision there; for one case was simply of a corporation, building a dam on its own land by authority of the legislature, and held not liable for injuries thereby occasioned to clams on the flats below; a second was of an owner of flats, held liable for

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taking oysters thereon out of season without license; and a third concerned a shad fishery in a river, above tide water. *Parker* v. *Cutler Milldam*, 20 Maine, 353. *Moulton* v. *Libbey*, 37 Maine, 472. *Preble* v. *Brown*, 47 Maine, 286.

In 1856 this doctrine was applied within the limits of the Massachusetts Colony to the same beach which was in dispute in *Brown* v. *Lakeman* and *Lakeman* v. *Butler*, *ubi supra*, very near the flats trespassed upon in *Ipswich Proprietors* v. *Herrick*, *post*, 529, and notwithstanding evidence of a claim of exclusive right, constantly asserted by sales of licenses and otherwise, running back almost to the time of that decision. *Lakeman* v. *Burnham*, 7 Gray, 437.

Notwithstanding the words of the ordinance of 1641, the public right of fishing is not confined to the inhabitants of the town. *Lakeman* v. *Burnham*, 7 Gray, 437. 2 Dane Ab. 694, 699. The common right of fishery does not authorize the public to fix stakes on flats belonging to the owner of the upland, for the purpose of setting a seine. *Locke* v. *Malley*, 2 Gray, 267. *Duncan* v. *Sylvester*, 24 Maine, 486. But below low water mark any one may use a seine. 2 Dane Ab. 692, 693. The right of taking shellfish does not include any right to take the soil, or dead shellfish imbedded therein, for manure. *Porter* v. *Sheham*, 7 Gray, 435. *Moore* v. *Griffin*, 22 Maine, 350.

Timber cast upon the beach by the sea, and not claimed by any previous owner, belongs to the owner of the beach. *Barker* v. *Bates*, 18 Pick. 255. So does seaweed, thrown upon the shore within the limits of the ordinance of 1647. *Cohasset Proprietors* v. *Tower*, (1821) 24 Law Reporter, 733. *Phillips* v. *Rhodes*, 7 Met. 323. The right to such seaweed depends upon the present extent of the beach, and not upon its condition when the owner acquired his title. *Phillips* v. *Rhodes*, 7 Met. 325. And it cannot be granted away by the legislature. *Cohasset Proprietors v. Tower*, 24 Law Reporter, 734. But, by a recent statute, seaweed adrift, moved by each wave, though touching the beach, may be taken by any one. *St.* 1859, *c.* 247. *Anthony* v. *Gifford*, 2 Allen, 549.

Public landing places exist in some towns by immemorial usage. *Commonwealth* v. *Manning*, 3 Dane Ab. 20. *Kean* v. *Stetson*, 5 Pick. 495. *Coolidge* v. *Learned*, 8 Pick. 511. In the Plymouth Colony, it was ordered in 1627 "that the old path ways be still allowed, and that every man be allowed a convenient way to the water, wheresoever the lot fall." 11 Plym. Col. Rec. 21; Plym. Col. Laws, (ed. 1836), 30. The earliest entry on the existing town records of Boston is an order of September 7th 1634, in Governor Winthrop's handwriting, to prevent obstructions of "the bridge and common landinge place," requiring that "whosoever shall unlade any stones, timber or logges, where the same may not be plainly seen at high water, shall set up a pole or beacon to give notice thereof," upon penalty of paying all damages; "this order to bee in force from this daye forward, being onely a declaration of the common lawe herein." 1 Boston Town Rec. 1. Old landing places cannot be discontinued, nor new ones laid out, without authority of the legislature. *Commonwealth* v. *Tucker*, 2 Pick. 47. *Kean* v. *Stetson*, 5 Pick. 495. *Bethum* v. *Turner*, 1 Greenl. 111. *Winslow* v. *Gifford*, 6 Cush. 327. *Bennett* v. *Clemence*, 5 Allen,

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On the 6th of March 1633, the general court ordered "that all the swamps conteyneing above one hundred acres, either belonging to any towne or not, shall lye in common for any free inhabitant to fetch wood att seasonable tymes, without prejudice to the inhabitants where the same is, (that swampe onely excepted lyeing within the Newe Towne pale towards the bay.)" 1 Mass. Col. Rec. 111. Whether a custom for all the inhabitants of a town to pick cranberries on a private estate is good, *quære*. *Barnstable* v. *Thacher*, 8 Met. 245.

Great ponds were not at first reserved as public property, or lying in common. On the 6th of May 1635, "there is 500 acres of land, and a freshe pond, with a little ileland conteyneing aboute two acres, graunted to John Humfry, Esqr. lyeing betwixte nore and west from Saugus," (afterwards Lynn,) which pond now lies in Lynnfield and Danvers, and is still known as Humfrey's Pond. 1 Mass. Col. Rec. 147, 211. Lewis's Hist. Lynn, 52. But the Body of Liberties, art. 16, and the ordinance of 1647, declared the right of fishing and fowling in great ponds to be free; and the latter provided "that no town shall appropriate to any particular person or persons any great pond, containing more than ten acres of land." 28 Mass. Hist. Coll. 219. Mass. Col. Laws, (ed. 1660) 50; (ed. 1672) 90, 91; Anc. Chart. 148, 149. The question of the effect of the grant to the town of Roxbury in the principal case upon the title to the pond shown on the plan, *ante*, 459, and the right of cutting ice therein, has been recently argued before the supreme judicial court, but not yet decided. *West Roxbury* v. *Stoddard*, 5 Allen. G.

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APPENDIX.

Province of the Massachusetts Bay, Essex, ss. } Anno Regni Regis Georgii Tertii, Magnæ Britanniæ, Franciæ et Hiberniæ duodecimo.

At his Majesty's Superior Court of Judicature, Court of Assize and General Goal Delivery, began and held at Ipswich within and for the County of Essex on the third Tuesday of June (being the 16th day of said month) Annoque Domini 1772.

By the Honourable PETER OLIVER, Esquire, Chief Justice.
EDMUND TROWBRIDGE,
FOSTER HUTCHINSON,
NATHANIEL ROPES &
WILLIAM CUSHING, } Esquires, Justices.

Proprietors of Common and Undivided Lands in Ipswich *vs.* Israel Herrick & another.*

Within that part of the Province of Massachusetts Bay, which had previously been in the Massachusetts Colony, the public had no right to take shellfish from flats lying between high and low water mark, within one hundred rods of the upland, and which had been improved by the owner for more than twenty years.

The Proprietors of the Common and Undivided Lands in Ipswich, who sue by John Patch the third, gentleman, Isaac Smith, gentleman, and Isaac Dodge, gentleman, a committee †

* This report, except the head note, is copied from the records in the custody of the clerk of the supreme judicial court at Boston. Rec. 1772, fol. 90, 91

† On file are copies of a vote of the proprietors in 1769 as to the mode of calling meetings; of a request, in the required form, to the clerk to call a meeting on the 13th of February 1771; of the return thereon; and of this vote

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by said proprietors legally chosen and appointed for that purpose, appellants, *vs.* Israel Herrick, labourer, and John Herrick, labourer, both of Glocester in said county, both minors under the age of twenty one years, appellees, from the judgment of an inferior court of common pleas held at Ipswich in and for the county of Essex on the last day of March A. D. 177. when and where the appellants in their said capacity were plaintiffs and the appellees were defendants. In a plea of trespass for that the said Israel and John Herrick on the 27th day of July A. D. 1770, with force and arms broke and entered on the soil and freehold of the said proprietors in Ipswich aforesaid, being the southeast part of [a place called Bull Island in *] Chebacco River there, and inclosed and butted on all parts by the water in said river, except on the northwest by the other part of said island owned by Thomas and Nathaniel Lufkin,† and then and there with force as aforesaid trod down, trampled upon, dug, tore up and consumed the soil and thatch banks of said proprietors there, and thereout dug, took and converted to their own use one hundred bushells of clams of the said proprietors, there being and growing, of the value of six pounds, and other enormities they the said Israel and John then and there perpetrated and did against the peace; all which is to the damage of said proprietors (as they by said committee say) the

passed at that meeting: "Voted, that Ensign John Patch, Capt. Isaac Smith, Mr. Isaac Dodge be a committee jointly or severally to prosecute in the law all persons that have or shall trespass in diging clams on the commoners' clam banks, and pursue the trespassers to finall judgment and execution."

Also the following paper: "It is agreed in ye action *Patch &c.* vs. *Herrick*, that the appearance of one of the committee be admitted for all.

"John Adams. Saml Porter."

* Writ on file, dated March 7th 1771.

† On file is a certified copy of this vote of the proprietors at a meeting on the 8th of August 1751: "The commoners' committee with Mr. Lufkin have viewed the state of the land at Bull Island, and settled the bounds with said Lufkin, beginning with the southeast side of Bull Island, at the stake and stones between Mr. Thompson's grant and the Thatch Lott No. 441, so to run on a strait line, as by the compass, northeast and by east, towards Corn Island: To which Mr. Lufkin consented in open meeting."

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sum of ten pounds. ["And the said Israel Herrick" "and the said John Herrick" respectively "(by John Lowell his guardian for this purpose appointed) comes and defends when, &c. and says he is not guilty in manner and form as the plaintiffs declare and thereof puts, &c. J. Lowell. And the plaintiff likewise. Saml. Porter." *] At which said inferior court judgment was rendered that the said Israel Herrick and John Herrick recover against the said proprietors costs. † This appeal was brought forward at said superior court of judicature, court of assize and general goal delivery, held at Ipswich in and for the county of Essex on the third Tuesday of June A. D. 1771, and by consent of parties said appeal was continued to the last term of said superior court, ‡ when and where the parties appeared, and the case after a full hearing was committed to a jury

* Pleas on file.

† In the court of common pleas the verdict was for the defendants generally, a copy of which is on file.

‡ Among John Adams's notes, in the possession of his grandson, Mr. Charles Francis Adams, are the following minutes of the evidence at this trial at Salem at November term 1771.

"PATCH *vs.* HERRICK. Clams.

"Pynchon. Grant of Ipswich or rather jurisdiction between the towns from Glocester town book 1642, and from the Province Secretary.

"1767. Perambulation from Glocester between them and Ipswich.

"Jacob Story. Perambulated for twenty years. We did not go to the marsh.

"Butler.

"Wm. Choate. The line a mile in the nearest place I should think. People freely dug.

"Lufkin. Freely dug. People on shore, with the commoners and their assigns. Have been mowing. Talk about three years about digging. Never forbid till within these years, and never knew of people's asking leave.

"Wm. Choate. In 1770, 27 July, 17 persons, 5 canoes, don't know who they are. Israel Herrick and John Herrick, it was said, were there. I went to them once, and told them they were trespassing seven years ago. 1761. Give 20*s.* a barrel [*qu.* a tide?] for digging, so that the custom about 2*s.* a barrel.

"Lufkin. 5 canoes, 15 persons, Cape Ann people. Knew John and Israel Herrick. We said nothing, nor they to us. 4 barrells of meat, 100 bushels in shells. 4 dollars a barrell. Never knew prohibited.

"Jacob Davis. Went from Cape Ann 5 years ago, and forbid, and we went off. They threatened to prosecute.

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sworn according to law to try the same, who returned their verdict therein upon oath, that is to say, they find specially, vizt.: That the southeast part of Bull Island, mentioned and bounded as in the writ, is salt water flatts lying on an arm of the sea, about two miles up Chebacco River,* and is part of the common and undivided lands in said Ipswich, and is the freehold of the plaintiffs', proprietors of those lands,† and annually for the space of twenty seven years last past hath been possessed and improved by said proprietors; ‡ that the defendants entered

"July 29, 1744 to 1760. Thatch banks, and all the knobs at Bull Island. Leases. 20*s.* &c. and 2*s.*

"Story. Hired the knobs. I looked upon it I hired to low water mark, as much as the grass. Remember when there was no grass on the flatts, now there is, and it increases, and clams under the thatch. Digging has a tendency to prevent the grass from getting in.

"Lufkin. Our thatch grows poorer. They have dug away most of the clams where there is no thatch."

Among the papers on file are certificates of the attendance as witnesses at this and other terms of Jacob Story, William Choate, Thomas Choate 3d, Daniel Lufkin, Nathaniel Lufkin, Jacob Davis and William Butler.

* Among the papers on file are two plans of the *locus in quo*, representing Bull Island as at the junction of two channels two and a half miles from the mouth of the Chebacco River, with thatch and clam banks towards the sea, and a large marsh outside of them between Cross's Island and Corn Island, which border one upon each channel; and all the space between the channels is marked as "swatch," "marsh," or "thatch and clam banks."

† On file are agreements determining the bounds between Ipswich and Cape Ann in May 1642, from the Ipswich and Gloucester town records; an order of the town of Ipswich of March 15th 1659, that "no house henceforth erected shall have any right to the common lands of this town, nor any person inhabiting such house make use of any pasture, timber or wood growing upon any of the said common lands, upon pretext of any right or title belonging to any such house hereafter built, without express leave and allowance of the town first had and obtained;" and perambulations of the bounds of Ipswich and Gloucester by the selectmen in 1767 and 1769.

‡ The only evidence on file of such possession and improvement consists of copies, indorsed "copy of the four first years that Bull Island was lett out," of votes of the proprietors at meetings held in 1744, 1745, 1746 and 1747 "to lett out the unappropriated thatch banks to the highest bidder," including "the knobbs at Bull Island," by annual leases; and a vote, passed on the 4th of July 1763, that a committee be chosen "to take care of all the flats and clams therein, belonging

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upon said southeast part of said island and dug fifty bushels of clams;* and if upon the whole matter the plaintiffs by law can maintain this action, then the jury find the defendants guilty and assess damages for the plaintiffs at four shillings and costs; otherwise, they find the defendants not guilty. And from thence said appeal was continued unto this court for advisement. And now after a full hearing of the parties by their attorneys on said verdict, and mature advisement thereon, it's considered by the court that the said John Patch, Isaac Smith and Isaac Dodge in their said capacity recover against said Israel and John Herrick four shillings lawfull money of this province damage, and costs taxed at £16: 9: 8½."

D. Farnham, N. P. Sargeant & S. Porter, for the plaintiffs.†

J. Adams & J. Lowell, for the defendants, (as appears by Adams's notes) cited "Charter, last page;" ‡ and "Old Colony Laws, [ed. 1672] page 90, Tit. Liberties Common," being the ordinance of 1647, Anc. Chart. 148; *ante*, 465 note.

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to the Proprietors of the Common Lands in Ipswich; and that no person or persons be allowed to digg any more clams than for their own use and to be expended in the town; and that all owners of fishing vessels and boats shall apply to one of said committee for liberty to digg clams for their vessel's use, fare by fare; and no owner of vessel or vessels, boat or boats, shall digg more clams than shall be allowed by one or more of said committee on penalty of prosecution; said committee are to allow one barrel of clams to each man of every vessel going to the banks every fare, and so also in proportion to boats fishing in the bay; and a majority of said committee are impowered to prosecute all offenders (to this vote) to finall judgment and execution in the name and behalf of said proprietors."

* Upon a rough draft of the special verdict, on file, Adams suggested: "and the flatts where the clams were dug are upon the coasts of New England, upon an arm of the sea or salt water river, where the King's subjects had been wont to fish when the Charter of this Province was made." To which Porter subjoined: "Note, not the least evidence hath been offered of this."

† The only evidence of this is the recognizance, on file, to prosecute the appeal from the inferior to the superior court, which is executed by Porter as attorney of the plaintiffs, and by Farnham and Sargeant as sureties.

‡ "Provided also, and our expresse will and pleasure is, and wee doe by theis presents for us, our heires and successors ordeyne and appoint, that theis presents shall not in any manner enure, or be taken to abridge, barr, or hinder any of

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our loving subjects whatsoever, to use and exercise the trade of fishing upon that coast of New England in America by theis presents mentioned to be graunted; but that they and every or any of them shall have full and free power and liberty to continue and use their said trade of fishing upon the said coast, in any the seas thereunto adjoyning, or any arms of the seas or saltwater rivers where they have byn wont to fishe, and to build and sett up upon the landes by theis presents graunted, such wharves, stages and workehouses as shalbe necessarie for the salting, drying, keeping and packing up of their fish to be taken or gotten upon that coast; and to cutt downe and take such trees and other materialls there groweing, or being, or shalbe needefull for that purpose, and for all other necessarie easements, helpes and advantage concerning their said trade of fishing there, in such manner and forme as they have byn heretofore at any tyme accustomed to doe, without making any wilfull waste or spoyle, anything in theis presents conteyned to the contrarie notwithstanding." Massachusetts Colony Charter, 1 Mass. Col. Rec. 19; Anc. Chart. 16, 17. The Province Charter contained a precisely similar proviso, except in limiting the common right of erecting wharves, stages and workhouses, and cutting trees, to "places lying waste and not then in possession of particular proprietors." Anc. Chart. 36, 37.

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ABATEMENT.

On the death of some of the complainants, pending a complaint on the Rev. Sts c. 116, for flowing land, the survivors alone may prosecute the suit, though some of the deceased complainants were tenants in common with some of the survivors. *Tyler* v. *Mather*, 177.

ACCOMPLICE.

See EXCEPTIONS, 8.

ACTION.

1. A town which voluntarily pays the fees of commissioners appointed by the legislature to establish the boundary line between it and another town, under a resolve of the legislature providing that such fees shall be paid by the towns, one half by each, cannot recover from the other town any part of the sum paid. *Inhabitants of South Scituate* v. *Inhabitants of Hanover*, 420.
2. An officer, who, after receiving an execution with notice that the claim on which the judgment had been recovered had been assigned to another person and was prosecuted at his cost, collects the amount of the execution and pays it to the nominal plaintiff, is liable in tort to the assignee for the amount of the costs in the action on the claim. *Riley* v. *Taber*, 372.
3. In an action of tort for forcibly entering the plaintiff's close and taking up and converting two posts, the taking and conversion of the posts is matter of aggravation, and disproving it does not defeat the action. *Phelps* v. *Morse*, 207.
4. Evidence of an attachment of goods on mesne process against one possessing but not owning them, and of a return of such attachment upon the writ, is sufficient, in the absence of controlling evidence, to support an action against the officer for the conversion of the goods. *Marble* v. *Keyes*, 219.

See HUSBAND AND WIFE, 4; SPIRITUOUS AND INTOXICATING LIQUORS, 9; WAY, 11, 12.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

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AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ANSWER.

See PLEADING, III.

APPEAL.

On appeal to this court from a judgment of the court of common pleas, charging a trustee in foreign attachment, who has disclosed in his answer an assignment to a claimant, if the record does not show facts establishing the validity of the assignment, the judgment must be affirmed. *Richards* v. *Smith*, 315.

See WARRANT, 2.

APPRENTICE.

If, after the execution of an indenture of apprenticeship at common law in this commonwealth by the father and the master of the apprentice, with covenants that the apprentice shall serve the master faithfully for a term of years, and shall board with his father at a certain rate as long as the latter shall be disposed to board him, the master removes with the apprentice to another state with his and his father's consent, the father, if he subsequently takes his apprentice away before the expiration of the term, is liable for breach of his covenants. *Aliter, it seems*, if the apprentice had been taken to the other state without the father's consent. *Lobdell* v. *Allen*, 377.

ARBITRAMENT AND AWARD.

1. Upon a reference by rule of court, the award must be made by the arbitrators named in the rule; and even if the parties by writing indorsed on the rule substitute an arbitrator in place of one of those named, and waive all exceptions, no judgment can be rendered on the award. *Woodbury* v. *Proctor*, 18.
2. The reference of a case by rule of court to an arbitrator to "award and determine the whole cause, including the law and the facts, but subject to the review and final adjudication of all matters of law in the cause by the court," does not make his award conclusive upon the question whether the terms of a grant from the general court, before the ordinance of 1647, passed the title to the soil between high and low water mark. And if the arbitrator reports all the facts with his award in favor of one party, the court may render judgment thereon for the other party, without recommitting the award. *Commonwealth* v. *City of Roxbury*, 451.

See INSURANCE, 7.

ARREST.

See FUGITIVE FROM JUSTICE; TAX, 2, 3

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ASSESSMENT.

See CORPORATION, 1.

ASSIGNMENT.

See ACTION, 2; INSOLVENT DEBTOR, 4; MORTGAGE, 4.

ASSUMPSIT.

See ACTION, 1; BREACH OF PROMISE OF MARRIAGE; PAUPER; WORK AND LABOR.

ATTACHMENT.

A wagon, with patent couplings attached, used by the owner in carrying on his business of selling patent couplings, is not exempt from attachment under Rev. Sts. *c.* 97, § 22, and *St.* 1855, *c.* 264. *Gibson* v. *Gibbs*, 62.

See ACTION, 4; ESTOPPEL, 2; MORTGAGE, 9; RECEIPTOR; SALE.

ATTORNEY AND COUNSEL.

1. When a fine is imposed in the court of common pleas, on appeal from a conviction before a justice of the peace, for selling intoxicating liquors, the attorney's fee, allowed by *St.* 1855, *c.* 215, § 17, is to be paid to the attorney who appeared for the Commonwealth before the justice, and not to the district attorney. *Commonwealth* v. *Rogers*, 278.
2. *It seems*, that in such a prosecution commenced in the court of common pleas, the attorney's fee upon conviction is to be paid by the district attorney into the treasury of the Commonwealth. *Ib.*

See BASTARDY PROCESS, 2; PARTNERSHIP, 2.

AWARD.

See ARBITRAMENT AND AWARD.

BASTARDY PROCESS.

1. It is no ground of dismissing a bastardy process, that the record of the justice before whom it was commenced states that he found the respondent guilty, and not that he adjudged him to be the father of the child. *Murphy* v. *Spence*, 399.
2. A bastardy process is not to be dismissed by the court of common pleas because the attorney appearing there for the complainant is the justice before whom the sworn accusation was made. *Reardon* v. *Russell*, 366.
3. At the trial of a bastardy process, the complainant cannot introduce evidence that five or six years previously she had a child by the respondent, which he and his relations acknowledged as his. *Boyle* v. *Burnett*, 251.
4. *It seems*, that in a suit for maintenance of a bastard child, the complainant cannot introduce evidence that the respondent's relations acknowledged the child as his. *Ib.*

See EXCEPTIONS, 1; WITNESS, 5.

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BILL OF PARTICULARS.

See Work and Labor.

BILLIARDS.

See Complaint, 1.

BOND.

1. A bond, given by a party convicted under a statute which requires him to give bond not to violate any law "concerning the sale of intoxicating liquors," is void if conditioned that he shall not violate any law "concerning the manufacture or sale of intoxicating liquors." *Commonwealth* v. *Kelly*, 259.
2. A bond made by a grantee of real estate to his grantor, in consideration of the conveyance, and conditioned to support his grantor for life, and, in case of neglect, to reconvey the land, does not constitute a mortgage; but, in case of neglect so to support, may be enforced in equity by decreeing a reconveyance. *Robinson* v. *Robinson*, 447.
3. B. agreed in writing to build and deliver a vessel for a certain sum, to be paid in instalments, one when the vessel should be in frame, and the other on the delivery of the vessel complete. After the vessel was in frame, C. refused to pay the first instalment unless B. would give him security for the completion and delivery of the vessel; and B. thereupon gave him a bond, reciting the written agreement, and conditioned that B. should, within a reasonable time after the time named in the agreement, finish and deliver the vessel, and, upon C.'s payment within ten days after such delivery, of the balance of the sum stipulated in the agreement, execute a conveyance of the vessel to him. *Held*, that B.'s subsequent failure to deliver the vessel according to the bond was a breach thereof, on which C. might sue without having paid the first instalment. *Crowell* v. *Brown* 274.

See Estoppel; Mortgage, 6.

BOUNDARY.

See Deed, 5–11; Evidence, 17, 18; Flats, 6; Mortgage, 2; Town.

BREACH OF PROMISE OF MARRIAGE.

1. In an action for breach of promise of marriage, evidence of the acts and conversation of the parties towards each other during a previous intimacy, which was broken off before the mutual promises relied on, is admissible. *Ray* v. *Smith*, 141.
2. In an action for breach of promise of marriage, the plaintiff introduced evidence that while the intimacy between the parties was broken off, and before the mutual promises relied on, the defendant expressed satisfaction that she had refused to walk with another man, and said that man "could not get her away as long as he had a claim on her." *Held*, that the evidence was admissible. *Ib.*
3. In an action for breach of promise of marriage, the plaintiff testified that,

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after the intimacy between the parties was broken off, she boarded at the same house as the defendant and another woman whom he afterwards married; and never knew or heard of any intimacy between them before the marriage. *Held*, that evidence that during that time the defendant was publicly attentive to his present wife, with the plaintiff's knowledge, was immaterial, and therefore inadmissible to contradict the plaintiff. *Ib.*

BURYING-GROUND.

See HUSBAND AND WIFE, 4.

BY-LAW.

See OFFICER.

CANAL.

See NUISANCE, 2.

CARRIER.

A common carrier who has received goods from a wharfinger, with whom they have been deposited by their owner without authority to forward them, has no lien on them for freight against the owner. *Clark* v. *Lowell & Lawrence Railroad*, 231.

CASE STATED.

When a statute requires a demand to be made in writing on the mayor and aldermen of a city thirty days before the commencement of a suit, an agreement in a case stated, that a demand was made on the city, will be understood to mean such a demand as is required by the statute. *Jennison* v. *City of Roxbury*, 32.

See LANDLORD AND TENANT, 3.

CASES OVERRULED, DOUBTED OR DENIED.

BETTS *v.* BAGLEY, 12 Pick. 572, ... *Bangs* v. *Watson*, 212.

CERTIORARI.

See WAY, 6, 8.

CITY.

See TOWN.

COLLATERAL SECURITY.

See INSOLVENT DEBTOR, 5; PROMISSORY NOTE, 8.

COLONY CHARTER.

1. Government of Massachusetts under, in 1629 and 1630, by Endicott and Winthrop, *Commonwealth* v. *City of Roxbury*, 479–487; *& note*, 503–512

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2. Legality of the transfer of to the Colony in 1630. *Note*, 509, 510.
3. Judgment against on *quo warranto* in 1635 invalid. *Note*, 510.
4. Effect of judgment on *quo warranto* against in 1684. *Note*, 517.

See FISHERY; FLATS.

COMPLAINT.

1. A complaint on *St.* 1855, *c.* 429, which alleges that on Saturday the 2d of August the defendant did keep a billiard room, and "did then and there" suffer certain persons to play at billiards in said room "after the hour of six of the clock in the afternoon of" said Saturday, sufficiently defines the time. *Commonwealth* v. *Crawford*, 128.
2. It is no defence to a complaint for selling intoxicating liquor "to a person whose name is to your complainant unknown," that at the time of making the complaint the complainant's only knowledge of the offence was by information from others. *Commonwealth* v. *Crawford*, 129.
3. A complaint for larceny, signed by the complainant below the description of the goods stolen, and above the charge of larceny, is not "subscribed by the complainant" as required by the Rev. Sts. *c.* 135, § 2. *Commonwealth* v. *Barkight*, 113.

See INDICTMENT; SPIRITUOUS AND INTOXICATING LIQUORS, 1, 3, 5–8; WARRANT.

CONDITION.

See HUSBAND AND WIFE, 1; STATUTE, 3.

CONFLICT OF LAWS.

See INSOLVENT DEBTOR, 3; LARCENY, 2.

CONSPIRACY.

An indictment averring that two partners agreed and conspired to procure over-insurance upon their stock in trade to a certain amount "by falsely pretending that said stock was of much greater value than" that amount, and, as a part of that agreement, agreed and conspired to obtain that amount from the insurers as and for a loss, "by means of false pretences of a loss thereafterward to happen, with design, under pretence of a loss, to cheat and defraud" the insurers "of their moneys by means of said false pretences," without more particularly stating the means by which the money was to be obtained, is insufficient. *Commonwealth* v. *Prius*, 127.

CONSTABLE.

See OFFICER.

CONSTITUTIONAL LAW.

Land devised in trust to pay the income, during the life of the testator's sons and the survivor of them, to them and the heirs of those who should die first, and,

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on the survivor's decease, to convey the land to their heirs, may under authority of the legislature be sold, upon giving security to invest the proceeds upon the same trust. *Clarke* v. *Hayes*, 426.

See COLONY CHARTER; FUGITIVE FROM JUSTICE, 2, 3; SPIRITUOUS AND INTOXICATING LIQUORS, 3, 4.

CONTRACT.

1. A written agreement for drawing stone, "at the rate of one dollar and twenty five cents per load of two tons each," fixes the rate by the ton, without regard to the number of tons actually drawn in one load; and cannot be varied by oral evidence. *Huntley* v. *Woodward*, 86.

2. The vendor of a house agreed in writing with the purchaser to "secure a supply of well water," to do certain work, and to pay certain charges upon the house. *Held*, that he could not show that at the same interview at which this agreement was delivered, and immediately after its delivery, the purchaser orally agreed to discharge him from this agreement upon his putting into the house a proper apparatus to conduct water from a certain aqueduct. *Kimball* v. *Bradford*, 243.

3. By the articles of a mining association formed in Massachusetts, to go to California, it was agreed that the association should buy a vessel, and furnish her with supplies "for the period of eighteen months from the day of sailing, for which term the company is to continue;" that the owner of each share should pay a certain sum to the treasurer, and either go on the expedition himself or furnish a substitute; that each member or substitute who should go should have his board and medical attendance at the expense of the company, and should for said period of eighteen months devote himself to the service of the company, under the direction of its officers, and deliver to the treasurer all gold, money or other things obtained by him; that the business of the company should be managed by a board of directors; that the profits and the losses should be equally divided among the shares; that after arriving in California the affairs of the company should be stated monthly, "and a division of profits may be then made to such extent as may be decided by the vote of two thirds of the members and substitutes present and voting," provided that no substitute should receive more than the share stipulated for between him and the owner; that at the expiration of the eighteen months the company should by vote decide whether to return home, or extend operations for a limited period; and that "if at any time two thirds of the members present and voting shall decide to sell the vessel, &c., all owners shall be bound to join in the sale and conveyance; and, in all cases, the substitute shall have the same right to vote as his principal would have, and each share shall be entitled to one vote." A month after the arrival of the expedition in California, by direction of the officers of the association, and with the general assent of all the members and substitutes in California, the association was dissolved, the vessel and remaining outfits sold, and the profits divided by deducting all the expenses of the association from so much of the amount of the sale of the ship and outfits

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as equalled the original cost thereof, and dividing the residue of so much of that amount among the shareholders; and in the excess of such sale over the cost, and in the earnings of the association, giving to each substitute one half of his principal's proportion. *Held*, that a substitute was entitled to hold the sum so distributed to him, as against his principal, by contract with whom he was to "receive two thirds of all property and sums to which" his "share should become entitled under said articles, until the association is dissolved, and agreed during the term of said association and during the time to whic it might be extended to devote himself to its service, and comply with its regu lations. *Davis* v. *Allen*, 322.

4. A promise to pay "J. S. or his wife A. S." an annuity "during their natura lives" is a promise to pay during their joint lives and the life of the survivor *Hayden* v. *Snell*, 365.

5. By indenture, A. agreed to make certain advances to B. for building and finishing a house on A.'s land, and seventy days after its completion to convey the house and other land to B.; and B. agreed to build the house and furnish all the labor and materials, and, upon delivery of the deed, to repay to A. all his advances with interest, and to pay a certain price for the land, either in cash or by note payable in five years and secured by mortgage of the land. *Held*, that the agreement to deliver the deed and to pay the money were mutual and dependent stipulations, and that B. could not, four years after the completion of the contract, and two years and a half after A.'s death, elect to pay by note secured by mortgage; but that upon payment of the money according to the contract he was entitled to specific performance. *Phillips* v *Soule*, 233.

6. A party to a written agreement for building a house, the plan of which is subsequently altered by oral consent at his suggestion so as to postpone the work without fixing any new time for its completion, cannot afterwards object to its not having been completed at the time originally agreed upon. *Palmer* v *Stockwell*, 237.

See APPRENTICE; BOND; EVIDENCE, 13; FRAUDS, STATUTE OF; INSOLVENT DEBTOR, 6; MECHANICS' LIEN; RAILROAD; WORK AND LABOR.

CORPORATION.

1. A book containing subscriptions to the stock of a corporation for as many shares as the charter required should be subscribed for before any assessment was laid, which came into the possession of the corporation immediately on its organization, which has been always treated by them as showing the number of shares subscribed for, and on the faith of which the directors have laid an assessment, is *prima facie* evidence that the number of shares requisite for an assessment had been subscribed for. *Marlborough Branch Railroad* v. *Arnold*. 159.

2. It is no ground for dissolving a manufacturing corporation, on the petition of a majority in number of the stockholders, owning a minority of the stock, that one owner of the majority of the stock has for many years controlled the elec-

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tion of officers and elected himself agent and clerk; that he has for a long time managed the business "according to his own will and choice, regardless of the wishes and interests of the petitioners;" that according to his statement the corporation has been doing a losing business for many years; that he has refused to make any change in the business, or to purchase the shares of the petitioners; and that if the business were skilfully and properly managed it might be made a source of profit to all concerned. *Pratt* v. *Jewett*, 34.

See COLONY CHARTER; DEED, 2; PRINCIPAL AND AGENT, 1. 5

COSTS.

See ATTORNEY AND COUNSEL.

COUNSEL.

See ATTORNEY AND COUNSEL.

COUNTIES

In Massachusetts, original establishment and subsequent division and boundaries of. *Note*, 512, 513.

COUNTY COMMISSIONERS.

See WAY, 6–10.

COVENANT.

See ESTOPPEL, 1.

DECLARATION.

See PLEADING, II.

DEED.

1. *It seems*, that in this commonwealth sealing, without signing, is not a sufficient execution of a conveyance of land. *Hutchins* v. *Byrnes*, 367.
2. An assignment of a mortgage of real estate from a corporation, concluding, "In witness whereof the said B. C. S. Bank, by J. S., their treasurer, duly authorized for this purpose, have hereunto set their name and seal," signed "J. S., Treasurer B. C. S. Bank," and sealed, is in form executed by the corporation. *Ib.*
3. The acknowledgment by a husband, after issue born, of a deed made by him jointly with his wife, of land held by her to her separate use under *St.* 1845, *c.* 208, is sufficient to authorize it to be recorded. *Palmer* v. *Paine*, 56.
4. Knowledge of the occupation and improvement of land is not such "actual notice" of an unrecorded deed of the land to the occupant, as will give effect to the deed against others than the grantor, under the Rev. Sts. *c.* 59, § 28. *Mara* v. *Pierce*, 306.
5. Land conveyed was described in the deed, after an accurate description of its

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boundaries from its northern extremity around its western and southern sides to a point on the east at the K. road; "thence turning and running northerly, bounding easterly by said road until it comes to land of B.; thence turning and running westerly by land of said B. until it comes to the southeasterly corner of an acre lot" included in the land conveyed; "thence turning and running northerly, bounding easterly by said B.'s land to the W. road; thence turning and running westerly, bounding northerly by said road, to the place of beginning." The K. road extended northeastwardly until it joined the W. road which ran from northeast to southwest. On the southwesterly side of the W. road, between that junction and the point of beginning of the description, were three lots, equal in depth; the widest, known as the L. lot, next the K. road; then a lot of B, and then the acre lot. B. owned all the land abutting on the opposite side of this part of the W. road. The deed referred to the grantor's sources of title, and to a plan, none of which included the L. lot. *Held*, that the L. lot did not pass by the deed. *Ide* v. *Pierce*, 350.

6. A conveyance of land, "beginning at an angle in the stone wall on the easterly side of the aforesaid road;" thence running around the rear of the lot granted "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first mentioned bound;" excludes the road. *Smith* v. *Slocomb*, 36.

7. A conveyance of land "bounded on" a private way leading to the grantor's dwelling-house carries the fee to the centre of the way. *Fisher* v. *Smith*, 441.

8. A deed, bounding land on a street delineated on a plan referred to in the deed, exhibited at the sale, and subsequently recorded by the grantor in the registry of deeds, estops the grantor and those claiming under him to deny the existence of the street of the full width and extent laid down on the plan. *Farnsworth* v. *Taylor*, 162.

9. The owner of a tract of land laid it out into streets and house lots, and sold the lots by auction on the premises; and distributed at the sale, and recorded in the registry of deeds, a plan, on which the streets and house lots were delineated; and referred to said plan in his deeds, one of which bounded the land conveyed "on a forty feet street laid down on said plan, and called Y. Street," which street on the plan was forty feet wide, except towards its termination in V. Street, where it grew wider. *Held*, that the grantor and those claiming under him were estopped to shut up any part of said street as shown on the plan, even outside of the width of forty feet, and although the selectmen had laid out Y. Street only forty feet wide throughout; and that the subsequent narrowing of V. Street by the county commissioners did not affect the rights of the parties. *Ib.*

10. A deed bounding land on a way shown on a plan, which is referred to in the deed and afterwards recorded by the grantor in the registry of deeds, estops the grantor and those claiming under him to obstruct the way opposite the land granted and within its side lines, if produced at right angles to the course of the way; even if outside those lines if continued in the direction in which they

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and all similar lines of other lots on the same way run, and although at that end the way does not connect with any other. *Rodgers* v. *Parker*, 445.

11. A deed of land bounded "westerly by P.'s Mill Pond," which has been artificially created by erecting a dam across a stream, and through which the thread of the stream has always been apparent, passes the land to the thread of the stream. *Phinney* v. *Watts*, 269.

12. The owner of a mill on a stream, and of a right to flow during half the year part of the meadow on which the head of water was raised, and of the right to flow the residue of the meadow all the year, granted to the owner of a mill above his own and at the outlet of the meadow a privilege to draw water "sufficient to carry a water wheel well constructed, with twelve feet head and fall, for two common blacksmith bellows, and, should the head and fall be less than twelve feet, sufficient to carry one bellows twelve hours in twenty four, in either case in the daytime, as near as may be." *Held*, that the grantee took, as against the grantor's mill, the whole power granted for the whole year; but, as against third persons, only that power limited by the restriction of the grantor's right of flowing part of the meadow; that the rights acquired by the grant might be designated in equity by some other mode of measurement; that the restriction was not affected by a previous reservation to an intermediate mill, also owned by the grantor, of a right to flow the whole meadow at all seasons; and that a subsequent purchaser of the lowest mill and of the land occupied by the dam and reservoir, if he did not use that mill, was not bound to keep the dam in repair for the benefit of the privilege above granted; but could not hoist the gates of the dam and thus waste the water to the injury of that privilege. *Phelps* v. *Tourtellot*, 102.

See Estoppel, 1; Evidence, 6, 11, 12; Exceptions, 8; Flats; Grant; Mortgage, 2, 3; Way, 1.

DEMAND.

See Case Stated; Dower; Receiptor, 1.

DEMURRER.

See Equity Pleading.

DEPOSITION.

A deposition taken in another state by a magistrate, whose certificate states that the deponent swore to the truth of the deposition, is admissible in evidence, though the certificate does not state that the deponent was sworn before his examination. *Quinley* v. *Atkins*, 370.

DEVISE.

See Will.

DISSEISIN.

1. Cutting grass nearly every year on flats covered part of the time by the tide does not amount to disseisin. *Commonwealth* v. *City of Roxbury*, 451.

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2. Cutting timber for fences by one tenant in common, from time to time for more than twenty years, in a cedar swamp surrounded by cultivated lands, is no disseisin of his cotenant. *Ewer* v. *Lovell*, 276.

DOMICIL.

An inhabitant of P., being out of health, gave up business there and removed to F. with the intention of remaining there through the summer, and of returning to P. in the autumn to reside and do business there. The next autumn his health was restored, but, not finding satisfactory business in P., he remained in F. until the following March, when he entered into business elsewhere, and intended, as soon as he could make arrangements, to remove to C. to reside, and made a contract for the removal of his furniture to C. as soon as possible, and on the first of May put it on board a vessel, and a few days afterwards personally removed to C. *Held*, that he was rightly taxed in F. on said first of May. *Carnoe* v. *Inhabitants of Freetown*, 357.

DOWER.

A demand of dower in land held by two persons in severalty will not support an action against either for dower in his part of the land. *Pond* v. *Johnson*, 193.

EASEMENT.

See INFORMATION, 3

EMBEZZLEMENT.

A mechanic receiving materials to be made into shoes at his own shop is not an agent or servant of the person furnishing the leather, within the meaning of the Rev. Sts. *c.* 126, § 29, against embezzlement. *Commonwealth* v. *Young*, 5.

EQUITY.

1. The purchaser at a sheriff's sale on execution of an equity of redemption, attached as having been conveyed in fraud of creditors, may maintain a bill in equity to avoid the fraudulent conveyance and redeem the mortgages. *Gerrish* v. *Mace*, 235.

2. A trustee, having a naked legal title in land, cannot be restrained in equity from asserting his title or conveying it away, or compelled to convey it to one to whom the *cestui que trust* has transferred his title, without proof of a written agreement, or joining the *cestui que trust* as a party to the bill. *Richards* v. *Richards*, 313.

See BOND, 2; CONTRACT, 5; DEED, 12; INSOLVENT DEBTOR, 1–3; MORTGAGE, 8; NUISANCE, 1.

EQUITY PLEADING.

It seems, that a demurrer to a bill in equity, which alleges that a *cestui que trust* sold land and directed the trustee to convey, admits that there was an agreement in writing for the sale and conveyance of the land. *Richards* v. *Richards*, 313.

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ERROR.

On the reversal by writ of error of a judgment of the court of common pleas for omission to give further notice according to the Rev. Sts. *c.* 92, § 3, this court has no power to order such notice, but must enter a general reversal. *Packard* v. *Matthews*, 311.

ESTATE IN FEE.

See WILL, 1, 2.

ESTOPPEL.

1. An heir and residuary devisee, who has given bond as such devisee to pay the debts of his testator, is estopped to set up a subsequent title as heir of the testator's wife, against a warranty deed of her land made by the testator, although all right of action upon the covenants in that deed is barred by the statute of limitations. *Cole* v. *Raymond*, 217.

2. The execution of a bond to dissolve an attachment on mesne process does not estop the surety to assert his own title in the property so attached against a subsequent attachment thereof by the obligee. *Rogers* v. *Bishop*, 225.

See DEED, 8–10.

EVIDENCE.

1. Confessions made by one so intoxicated as not to understand them are no evidence of guilt. *Commonwealth* v. *Howe*, 110.

2. Whether a party making confessions was so much under the influence of intoxicating liquor as not to understand what he was confessing is a question for the jury. *Ib.*

3. On the trial of an indictment for breaking and entering a shop and stealing therein, the only evidence against the defendant was his confession, made while under the influence of intoxicating liquor, that he and another person broke into the shop and stole the goods described, and that the defendant sold part of the goods to a third person. *Held*, that the defendant might introduce evidence to disprove all the facts which he was said to have confessed. *Ib.*

4. On the trial of a complaint charging an unlawful sale of intoxicating liquors in September, after the person to whom the sale was alleged to have been made had testified to one sale in August, and others in September, the district attorney, against the defendant's objection, was allowed to withdraw all the evidence except of a sale in August, and the jury were instructed to consider only the evidence of that sale, and found the defendant guilty of a sale in August. *Held*, that the evidence so withdrawn might be introduced in support of a complaint for a sale in September, and, if it proved to the satisfaction of the jury a sale other than that of which the defendant had been found guilty, would warrant a conviction. *Commonwealth* v. *Leonard*, 285.

5. On a criminal trial, if the Commonwealth fails to make out a *prima facie* case, the fact that the defendant produces no evidence to negative an averment

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which the government is bound to prove will not warrant the jury in finding that such averment is proved. *Commonwealth* v. *Hardiman*, 136.

6. On the trial of an indictment for obtaining a signature to a deed by false pretences, previous conversations of the defendant with a third person as to procuring such a signature are admissible in evidence against him. *Commonwealth* v. *Castles*, 121.

7. A conviction of an offence cannot be proved by an unofficial copy of the clerk's docket, supported by the copyist's oath. *Commonwealth* v. *Brooks*, 299.

8. A record, kept as required by the regulations of the post-office department under the U. S. St. of 1855, *c.* 173, of registered letters received at a post-office, is admissible in evidence, without the testimony of the clerk who actually kept it. *Gurney* v. *Howe*, 404.

9. A mistake in the date of the receipt of a letter, as stated in a record of registered letters, kept according to the U. S. St. of 1855, *c.* 173, and produced by the postmaster, is not conclusive, but may be controlled by his testimony to the ordinary course of the mails. *Ib.*

10. The following testimony of an attorney was held sufficient to warrant the introduction of secondary evidence of the contents of a letter sent to him by his client in a previous case: "I do not know where that letter is. I have searched twice during the past week for it among my papers at my office and other places where I keep my papers, but have not been able to find it. My impression is that the letter lay upon my table till after I had seen the plaintiff at that trial, and then went into the waste basket." On cross-examination, he testified: "I did not look through all my files of letters and papers, for, when I came across a file marked as of a previous year, I did not search through it, I did not examine the papers I looked over one by one, and there were places containing papers (but not private papers) that I did not examine." *Hatch* v. *Carpenter*, 271.

11. Evidence that neither of the parties to a deed understood its legal effect and operation at the time of its delivery is inadmissible to defeat the deed. *Winslow* v. *Driskell*, 363.

12. Evidence that a grantor, about the time of executing a deed of land bounded on a way, built a wall and established bounds at the edge of the way, is inadmissible to prove that the way did not pass by the deed. *Fisher* v. *Smith*, 441.

13. In an action on an agreement to build an octagonal cellar wall at a certain price by the foot, evidence of the usage of measuring the angles of such walls, and of the proper mode of measuring the angles of rectangular walls, is admissible. *Ford* v. *Tirrell*, 401.

14. In replevin of goods on the ground that they were obtained by the defendant from the plaintiff by fraud, evidence of other similar frauds practised by the defendant upon third persons about the same time is competent evidence. *Wiggin* v. *Day*, 97.

15. Upon the trial of a complaint for flowing land, a witness called by the respondent testified on cross-examination that the complainant and other owners of the land flowed chose a committee to procure a survey of the stream. *Held*,

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that this did not authorize the respondent to give in evidence the report of the committee, or the fact that such landowners subsequently cleared out the stream. *Tyler* v. *Mather*, 177.

16. On the trial of a complaint for flowing land, a declaration of the grantor and warrantor of the respondent (who has assumed the defence of the suit) as to the right of flowing, is not admissible in evidence, if made when he had no interest either in the dam or the land above it. *Ib.*

17. Declarations as to boundaries, made by one, now deceased, who had previously occupied, but never owned, the land, and who had ceased to occupy it at the time of the declarations, are inadmissible against a subsequent owner. *Whitney* v. *Bacon*, 206.

18. Perambulations of the boundaries of towns by the selectmen are no evidence against the Commonwealth of the title to flats within those towns. *Commonwealth* v. *Roxbury*, 451.

19. A paragraph in a newspaper, which states that a certain person is a member of a certain partnership, but does not purport to have been inserted by the partnership, is not admissible to charge him as such, merely on proof that he was a subscriber to the paper at that time, and never requested the editor to deny any such statement. *Potter* v. *Greene*, 309.

20. In an action to recover damages sustained by a collision between the defendant's and the plaintiff's carriages, evidence that the defendant's servant, who had charge of his carriage, immediately after the collision, and while the defendant was being extricated from his carriage, and while the crowd was about, said that the plaintiff was not to blame, is not admissible, either as part of the *res gestæ*, or to contradict the testimony of the servant. *Lane* v. *Bryant*, 245.

21. The narration by a patient to his physician of the cause of injuries received several months previously is not admissible as evidence of that cause. *Chapin* v. *Inhabitants of Marlborough*, 244.

See ACTION, 3, 4; BASTARDY PROCESS, 3, 4; BREACH OF PROMISE OF MARRIAGE; CONTRACT, 1, 2; CORPORATION, 1; DEPOSITION; EXCEPTIONS, 2–9; FUGITIVE FROM JUSTICE, 1; HUSBAND AND WIFE, 2; INDICTMENT; INSURANCE, 5, 7; JURY; LARCENY, 3, 4; MALICIOUS PROSECUTION; MILL, 3–6; NOTICE; NUISANCE, 4–6; PARTNERSHIP, 2; PLEADING, 5–9; PRINCIPAL AND AGENT, 4, 5; PROMISSORY NOTE, 2–7; RECEIPTOR, 2, 3; RECOGNIZANCE; REPLEVIN; SPIRITUOUS AND INTOXICATING LIQUORS 2, 11; WAY, 2, 7; WITNESS.

EXCEPTIONS.

1 Objections to the form of a complaint filed in the court of common pleas under the bastardy act cannot be first taken in this court to which the case has been brought on other exceptions. *Murphy* v. *Spence*, 399.

2. If the question whether a defendant, when making confessions of guilt, was so intoxicated as not to understand them, is submitted to the court as preliminary to the admission of a witness to the confessions, and is decided by the court upon the testimony of that witness only, rejecting evidence of other witnesses

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that shortly before and after the conversation at which the confession was made the defendant was intoxicated, it is ground of exception. *Commonwealth* v. *Howe*, 110.

3. On the trial of an indictment the Commonwealth relied on the testimony of an accomplice; and the judge instructed the jury that they might convict on the testimony of an accomplice alone, but that it was unsafe to rely upon it without confirmation on some point material to the issue, and connecting the defendant with the offence charged; and submitted the question of corroboration to them upon all the evidence in the case. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Brooks*, 299.

4. The rejection of secondary evidence, after the introduction of sufficient preliminary evidence to warrant its admission, may be revised on exceptions in which all the evidence is reported. *Hatch* v. *Carpenter*, 271.

5. The admission, to contradict evidence of the adverse party, of testimony which appears to relate to the same transaction, but is afterwards proved by other evidence to be a different one, is no ground of exception, without showing that the jury were not instructed to disregard it. *Randall* v. *Doane*, 408.

6. The admission, after the close of the defendant's evidence, of evidence which does not tend to rebut new matter introduced in defence, is within the discretion of the presiding judge, and no ground of exception, even if he does not assign any reason for its admission. *Ray* v. *Smith*, 141.

7. Permitting a defendant, after the commencement of the plaintiff's closing argument, to introduce evidence to explain entries then first pointed out by the plaintiff in books previously put into the case by the defendant, is no ground of exception. *Smith* v. *Merrill*, 144.

8. The admission of other proof of the execution of a deed is no ground of exception by a party who subsequently calls and examines the subscribing witness. *Commonwealth* v. *Castles*, 121.

9. In a civil case the jury were instructed that the burden of proof was upon the plaintiff, and was sustained "if upon the whole proof there was a preponderance of evidence, that is to say, a balance of the probabilities of the case, in his favor." *Held*, that the explanation was indefinite, and tended to mislead the jury. *Haskins* v. *Haskins*, 390.

10. An action of trespass, in which the defendant justifies under a claim of right, exercised without unnecessary force, cannot be transmitted to this court upon exceptions to a *pro forma* ruling of the court of common pleas that "not considering the question of damages, the plaintiff could not maintain his action," without disposing of the question whether unnecessary force was used. *Goddard* v. *Perkins*, 411.

11. A case ordered by the court of common pleas, after its final determination there, to be continued for the allowance of exceptions, may be entered in this court at the first term after their actual allowance. *Boyle* v. *Burnett*, 251.

12. The owner of different chattels taken by one trespass brought two separate actions for their conversion, the second of which was tried while the jury were consulting upon the first, and, although the first action had not been pleaded

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in abatement of it, resulted in a verdict for the defendant, under the instructions of the presiding judge, to which the defendant excepted. The jury in the first action returned a verdict for the plaintiff, upon which judgment was rendered, and, on exceptions, affirmed by this court. *Held*, that the plaintiff's exceptions in the second action must be overruled. *Marble* v. *Keyes*, 221

See SPIRITUOUS AND INTOXICATING LIQUORS, 10

EXECUTOR AND ADMINISTRATOR.

See HUSBAND AND WIFE, 2; PRINCIPAL AND AGENT, 2; WITNESS, 3.

FALSE PRETENCES.

An indictment charging a false pretence that a false coin was a good and current gold coin, and that the person to whom the pretence was made, being deceived thereby, was thereby induced to receive the same as a good and current gold coin, and to deliver to the defendant in exchange therefor certain bank bills and silver coin, described, sets forth the contract with sufficient certainty. *Commonwealth* v. *Nason*, 125.

See CONSPIRACY; EVIDENCE, 6.

FISHERY.

1. Rights of, under the Colony Charter and subsequent statutes. *Note*, 525–527.
2. Within that part of the Province of Massachusetts Bay, which had previously been in the Massachusetts Colony, the public had no right to take shellfish from flats lying between high and low water mark, within one hundred rods of the upland, and which had been improved by the owner for more than twenty years. *Proprietors of Common Lands in Ipswich* v. *Herrick*, 529. But see *Lakeman* v. *Burnham*, 7 Gray, 437, and other cases cited in *note*, 526, 527.

FIXTURES.

See MORTGAGE, 3.

FLATS.

1. The Massachusetts Colony Charter conveyed to the grantees all public and private rights in the seashore between high and low water mark. *Commonwealth* v. *City of Roxbury*, 451.
2. An act establishing a mill corporation, with authority to exclude the tide waters from flats of the Commonwealth, and to use them as a basin for the purposes of a mill power, does not release the title of the Commonwealth to such flats. *Ib.*
3. Rights of the public and of individuals in, under the Massachusetts Colony Charter and the ordinance of 1647. *Note*, 513–521, 527.
4. Rules for the division of, among coterminous proprietors. *Note*, 521, 523.
5. Seisin and disseisin of. *Note*, 523, 524. See DISSEISIN, 1.
6. Extent of grants of land bounding on. *Note*, 524, 525.

See EVIDENCE, 18; GRANT; INFORMATION; STATUTE, 3; TOWN.

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FORGERY.

An indictment, either at common law, or under the Rev. Sts. c. 127, § 2, for uttering as true a forged indorsement of a promissory note, which sets forth the note and indorsement according to their tenor, need not describe the instrument as a promissory note "for the payment of money." *Commonwealth* v. *Castles*, 123.

FRAUD.

See CONSPIRACY; EQUITY; EVIDENCE, 14; INSOLVENT DEBTOR, 1, 10, 11; INTEREST, 2; SALE.

FRAUDS, STATUTE OF.

1. An oral promise, for a valuable consideration, to indemnify another from his liability as bail for a third person, is not within the statute of frauds. *Aldrich* v. *Ames*, 76.

2. A guardian, who acts as auctioneer in selling land of his ward under license of court, is not authorized as such to sign for the purchaser a memorandum in writing to take the sale out of the statute of frauds. *Bent* v. *Cobb*, 397.

See EQUITY, 2; EQUITY PLEADING; TRUST.

FUGITIVE FROM JUSTICE.

1. A precept from the governor of a state, appointing an agent to receive a fugitive from justice, reciting that he had made a requisition, agreeably to the Constitution and laws of the United States, upon the governor of the state into which the fugitive was alleged to have escaped, is *prima facie* evidence, for the protection of the agent, of the truth of the recitals. *Commonwealth* v. *Hall*, 262.

2. A warrant issued by the governor of this commonwealth, authorizing the agent of another state to "take and receive into custody" a fugitive from justice, authorizes him to arrest such fugitive; and is not repugnant to the Constitution and laws of this state or of the United States. *Ib.*

3. The provisions of Rev. Sts. c. 142, § 7, authorizing the governor alone to issue his warrant for the apprehension of a fugitive from justice, are not repugnant to the U. S. St. of 1793, directing the demand and surrender of such fugitives to be made by "the executive authority of a state." *Ib.*

4. Upon a requisition from the governor of another state for the surrender of a fugitive from justice, the governor of this commonwealth issued a warrant for his arrest to the agent of that state, and a similar warrant to a sheriff and his deputies. *Held*, that an arrest by a deputy sheriff under the latter warrant, and a discharge of the alleged fugitive on bail on a writ of habeas corpus, did not prevent an arrest by the agent of the other state under the first warrant. *Ib.*

GRANT.

1. A grant of land by the colonial government of Massachusetts before the ordinance of 1647 did not pass the soil of the seashore between high and low water mark, without express words. *Commonwealth* v. *City of Roxbury*, 451.

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2. The order of the general court of 1636, "that all the rest of the ground lying between Dorchester bounds and Boston bounds shall belong to the town of Roxbury, easterly of Charles River, (except the propriety of the aforesaid town, which they purchased of particular persons,) Roxbury not to extend above eight miles from their meeting-house," did not grant to the town of Roxbury the title to the flats lying between Boston bounds and Dorchester bounds, more than one hundred rods below high water mark. *Ib.*

See ARBITRAMENT AND AWARD, 2; DEED; ISLANDS; FLATS; PONDS.

GUARDIAN AND WARD.

The guardian of a lunatic cannot be allowed in his probate account the amount of damages occasioned to his own property by his ward's want of care. *Erving v. Howe*, 84.

See WRIT OF ENTRY, 3.

HABEAS CORPUS.

See FUGITIVE FROM JUSTICE, 4.

HEIR.

See ESTOPPEL, 1.

HIGHWAY.

See WAY.

HOMESTEAD.

Under the homestead act of 1855, *c.* 238, which provides that "no property by virtue of this act shall be exempted from levy for any debt contracted previous to the passage of this act," a debtor who becomes insolvent, owing debts contracted before the passage of the act to an amount exceeding the amount exempted for a homestead, must surrender his homestead to his assignee in insolvency. *Woods v. Harding*, 16.

HUSBAND AND WIFE.

1. A legacy to a woman before marriage is reduced to possession by her husband by receiving a quitclaim deed from the testator's residuary devisee, upon condition that he should pay all legacies which such devisee was bound to pay, of which this was one. *Howard v. Bryant*, 239.
2. Money received by an agent of the wife with her husband's consent for her chose in action, and never reduced to possession by the husband, may be recovered from such agent by the administrator of the wife; and the husband's stipulations in an antenuptial contract, and in a mutual agreement of separation are admissible to disprove any such reduction to possession. *Hill v. Hunt*, 66.
3. An action cannot be maintained against a husband and wife on their joint promissory note given for his debt; but upon discontinuance against her, and payment of costs, may be amended and prosecuted against him alone. *Harrington v. Thompson*, 65.

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4. A husband, who has buried his wife in a public burial ground, is not liable as a trespasser for removing a grave stone since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. *Durell* v. *Hayward*, 248.

See DEED, 3; WITNESS, 1, 2.

INDICTMENT.

Under an indictment for breaking and entering the shop of a person named, it is no variance, under Rev. Sts. *c.* 133, § 11, if it appears that the shop is occupied by that person and another, each of whom pays rent to the owner thereof, and by mutual agreement occupies a distinct part of the shop, although it is not shown that the defendant broke and entered the part occupied by the person named. *Commonwealth* v. *Thompson*, 108.

See COMPLAINT; CONSPIRACY; FALSE PRETENCES; FORGERY; LARCENY; MALICIOUS MISCHIEF; NUISANCE, 2–4; PERJURY; SPIRITUOUS AND INTOXICATING LIQUORS, 1, 3, 5–8.

INFORMATION.

1. An information on Rev. Sts. *c.* 108, to recover lands below low water mark, and more than one hundred rods below high water mark, sufficiently describes the title of the Commonwealth by averring that it was "the owner in fee of all said channels, lands and flats." *Commonwealth* v. *City of Roxbury*, 451.
2. An information on Rev. Sts. *c.* 108 against a town does not admit its title in fee in flats sought to be recovered, by describing them as situated in that town. *Ib.*
3. A right of draining through land cannot be set up in defence to an information by the Commonwealth on the Rev. Sts. *c.* 108, to assert its title to the land. *Ib.*

INSANE PERSON.

See GUARDIAN AND WARD; PAUPER.

INSOLVENT DEBTOR.

1. If, after the filing of a creditor's petition for insolvency proceedings on the ground of a fraudulent preference, it is fraudulently agreed between the petitioning creditor and the debtor, in order to carry out such preference and to enable the debtor to obtain his discharge, that the debt of the petitioning creditor shall be paid and the petition dismissed, other creditors are entitled to come in and prosecute the petition. *Foster* v. *Goulding*, 50.
2. Proceedings in insolvency will not be set aside, as originally defective, on a bill in equity, filed by the debtor more than six years after their commencement, and after he has without objection appeared at several meetings of his creditors and submitted himself to examination. *Lincoln* v. *Bassett*, 355.
3. An insolvent debtor cannot maintain a bill in equity against his assignee for misconduct, without first applying to the court of insolvency for relief. *Ib.*

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4. Land was devised for life, and then directed to be sold and the net proceeds equally divided among the testator's children and their heirs. During the continuance of the life estate, one of the children became insolvent, and his property was assigned under *St.* 1838, *c.* 163. *Held*, that his own share passed to his assignees; as well as his right in the share of another child deceased since the testator, if such other child died before the assignment, but not otherwise. *Pierce* v. *Lee*, 42.

5. It is no objection to the proof in insolvency of a promissory note against the maker, that an accommodation indorser holds security from him, which has not been surrendered, and that the proof is offered at the indorser's request. *Meed* v. *Nelson*, 55.

6. A., having given his notes to certain creditors of a partnership for debts due to them from the partnership, gave a written agreement to one of those creditors, that he would not enforce the amount of said notes against the partnership, until said creditors should have been fully paid all sums then due and thereafter to be due from the partnership, and that the amount of his notes "as to all said creditors should remain as part of the business capital of" the partnership for three years. *Held*, that this agreement did not make A. a copartner, nor prevent his proving against the estate of the partnership in insolvency a note given to him by them in consideration for his said notes. *Wall* v. *Balcom*, 92.

7. A judgment on a debt for necessaries is barred by a certificate of discharge under subsequent proceedings in insolvency, although the original debt would not be barred. *Bangs* v. *Watson*, 211.

8. Under the *St.* of 1855, *c.* 362, a certificate of discharge under the insolvent laws of this commonwealth does not protect a debtor, who owed no debts here when the proceedings in insolvency were instituted, from debts contracted while residing in another state, before that statute took effect. *Dayton* v. *Crane*, 250.

9. The right of an insolvent debtor to a certificate of discharge upon the assent of the requisite proportion of his creditors whose debts are proved at the expiration of the six months cannot be affected by the subsequent expunging of the proof of any debt as having been allowed by mistake. *Gifford* v. *Barker*, 364.

10. A payment by an insolvent debtor to a preëxisting creditor is valid, except as against proceedings in insolvency, although both parties know the debtor to be insolvent. *Burt* v. *Perkins*, 317.

11. In an action by the assignee of an insolvent debtor under *Sts.* 1838, *c.* 163, and 1841, *c.* 124, to recover the value of goods conveyed away by the debtor the plaintiff has no ground of exception to instructions that he must prove that the debtor, at the time of making the sale, was in fact insolvent, and in fact intended to prefer the defendant as a preëxisting creditor; and that if he made the sale in good faith, and with the intent solely to procure means for the prosecution of his business, and with no intent to prefer a preëxisting creditor, the sale would not be invalidated by the fact that part of the consid

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eration was a credit on a previous debt from him to the purchaser. *Smith* v. *Merrill*, 144.

See HOMESTEAD; WITNESS, 4.

INSURANCE.

1. An application by a town for insurance on a school-house stated, in answer to an interrogatory, that the ashes were taken up in metallic vessels which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults; and concluded with a memorandum that "if ashes are allowed to remain in wood, the insurers will not assume the risk;" and was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground, at a distance from the building; but the boy employed by the school committee to take charge of the building, for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school-house. *Held*, that the insurers were discharged. *City of Worcester* v. *Worcester Mutual Fire Ins. Co.* 27.
2. An applicant for insurance on personal property, who has made, but not delivered, a bill of sale thereof, taking in return only a promissory note secured by mortgage thereon, may truly represent and warrant himself to be the owner thereof. *Vogel* v. *People's Mutual Fire Ins. Co.* 23.
3. A policy of insurance on the machinery in a silk factory, which provides that it shall be of no effect while the premises shall be used for storing "cotton in bales," "rags," or "wool," or for a "cotton mill," "woollen mill," or other "manufacturing establishment or trade requiring the use of heat," is not avoided by using one room for weaving a few pieces of stuff from woollen and linen thread and cotton, spun elsewhere and kept in the room. *Ib.*
4. Omission to disclose to insurers repeated incendiary attempts to destroy the property insured will not avoid the insurance. *Clark* v. *Hamilton Mutual Ins. Co.* 148.
5. In an action on a policy of insurance, in which the defence relied upon is a subsequent insurance contrary to the terms of the first policy, the burden of proving that the two policies covered the same property is upon the defendants. *Ib.*
6. A policy of insurance upon "carpenter's shop and carpenter's tools" provided that the issuing of any other policy covering any portion of the property insured, and not disclosed to these insurers, should avoid this policy. *Held*, that evidence of the issuing of another policy to the same person upon "four chests of carpenter's tools in wood shop," described as situated in the same street as in the first policy, and that there were in the shop two chests of tools belonging to the assured, and two or perhaps three belonging to the journeymen of the assured, did not show that any part of the property was covered by both policies. *Ib.*
7. Evidence of a submission by the assured and an agent of the insurers of the amount of a loss by fire to arbitration is not sufficient evidence of a waiver of

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a condition in a policy of insurance in foreign attachment requiring a particular account of the loss, to charge the insurers as trustees of the assured, if they state in their answers that they have never waived the conditions of the policy. *Pettengill* v. *Hinks*, 169.

8. Under a policy of insurance on a building against fire, which provides that the insurers may "make good the damage by repairs, and the insured shall contribute one fourth of the expense," if the insurers, intending to comply with this provision in good faith, make repairs of substantial benefit, though not fully making good the loss, the measure of the assured's damages is the difference between the value of the building as repaired, and what it would have been if fully repaired; deducting one fourth of their value to the estate *Parker* v. *Eagle Fire Ins. Co.* 152.

INTEREST.

1. On money due for labor, interest may be recovered after a demand of payment, made at the expiration of a reasonable time. *Ford* v. *Tirrell*, 401.
2. An agent, who, having received money under an agreement to invest it forthwith, fraudulently converts it to his own use, is liable for interest from the time of the receipt, and without previous demand. *Hill* v. *Hunt*, 66.
3. Upon the balance of an unliquidated and contested account, interest can be recovered only from the date of the writ, and not from a previous demand of payment. *Polmer* v. *Stockwell*, 237.

ISLANDS

In Boston Harbor, early grants of. *Note*, 511, 512.

JUDGMENT.

See ARBITRAMENT AND AWARD; COLONY CHARTER 3, 4; ERROR.

JURISDICTION.

Whether "the damages demanded exceeded twenty dollars," and thus entitle either party to demand a trial by jury before a justice of the peace under *St.* 1852, *c.* 314, is to be determined by the *ad damnum* in the writ. *Trees* v. *Rushworth*, 47.

JURY.

On the trial of a criminal case, the jury, some of whom had at the same term tried other similar cases, during the trial of which law books had been read to the jury by permission of the court, were instructed that they might bring to their aid in deciding on the evidence any knowledge which they had acquired from any source equally open to them all, but not any particular knowledge as to the law or the facts communicated to a part of them only; and that they were to decide this case on the evidence introduced into it, and not on any evidence of the law or facts introduced into other cases in which some of them did not sit; and that the jury were bound to consider the instructions of the court on the law of the case as evidence of the law, and that they must decide the case

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according to the evidence. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Lawrence*, 183.

JUSTICE OF THE PEACE.

See BASTARDY PROCESS, 2; JURISDICTION; PLEADING, 5; WARRANT, 2.

LANDING PLACES.

Origin and discontinuance of. *Note*, 527. See NUISANCE, 1.

LANDLORD AND TENANT.

1. The lessee of part of a house, with a right "to have the improvement of all the homestead land," cannot grant a license to a stranger to pass for his own purposes over the land, against the will of the lessor. *Richardson* v. *Richardson*, 213.
2. The owner of land having upon it a house occupied by a tenant at will conveyed away the land, reserving by parol a right to remove the house within six months, and the tenant continued in possession, paying rent to him, until after the expiration of the six months, and continued in possession after an alienation of the land by his grantee. *Held*, that the second grantee might maintain a landlord and tenant process against such tenant. *Hayden* v. *Ahearn*, 438.
3. Removal of the defendant and possession taken of the premises by the plaintiff, pending a landlord and tenant process, afford no defence, even if shown by an agreed statement of facts, unless pleaded *puis darrein continuance*. *Ib.*

LARCENY.

1. Intoxicating liquor, though purchased in this state in violation of *St.* 1855, *c.* 215, intended by the purchaser to be sold in violation of that act, and being transported from place to place in violation of that act, is a subject of larceny. *Commonwealth* v. *Coffee*, 139.
2. Stealing goods in another of the United States, formerly a colony of Great Britain, and bringing them into this commonwealth, may be punished as larceny here. THOMAS, J. dissenting. *Commonwealth* v. *Holder*, 7.
3. An indictment for larceny of property alleged to be of a value less than one hundred dollars is supported by evidence that the property was of any value. *Commonwealth* v. *McKenney*, 114.
4. On the trial of an indictment for larceny of a horse, the jury are warranted in finding that he is of some value upon evidence that he was a dark sorrel horse, weighing about nine hundred pounds, had a long tail, and was driven a long distance. *Ib.*
5. The punishment which may be imposed by the court of common pleas under Rev. Sts. *c.* 126, § 17, for larceny of property not exceeding one hundred dollars in value, is not affected by the value of the property, notwithstanding the concurrent jurisdiction given by § 18 to justices of the peace where the value is not alleged to exceed fifteen dollars. *Ib.*

See COMPLAINT, 3.

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LAW AND FACT.

See ARBITRAMENT AND AWARD, 2; EVIDENCE, 2.

LEASE.

See LANDLORD AND TENANT; RAILROAD.

LEGACY.

See HUSBAND AND WIFE, 1.

LIEN.

See CARRIER; MECHANICS' LIEN.

LIMITATIONS, STATUTE OF.

See ESTOPPEL, 1; WAY, 8; WORK AND LABOR.

LUNATIC.

See GUARDIAN AND WARD; PAUPER.

MALICIOUS MISCHIEF.

1. An indictment on the Rev. Sts. *c.* 126, § 39, which charges the defendant, in the words of the statute, with wilfully and maliciously administering a certain poison to the horse of another person, is sufficient, without further averment of any criminal intent, or of any injury to the horse. *Commonwealth* v. *Brooks*, 299.
2. An indictment on Rev. Sts. *c.* 126, § 39, which avers that the defendant did wilfully and maliciously kill a horse of another person, is sufficient, without more particularly setting forth the means or mode of killing. *Commonwealth* v. *Sowle*, 304.

MALICIOUS PROSECUTION.

In an action for a malicious prosecution against the plaintiff for assaulting the defendant with a knife, the defendant cannot introduce evidence that before the alleged assault the defendant had been informed that the plaintiff had carried dangerous weapons and had been prosecuted therefor; nor that the defendant before the affray in which the assault was pretended to have been committed saw the plaintiff lurking about his barn. *Bullock* v. *Lindsay*, 30

MANUFACTURING CORPORATION.

See CORPORATION, 2.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE.

MARRIED WOMAN.

See HUSBAND AND WIFE.

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MECHANICS' LIEN.

A contract to "do, perform and expend labor in the erection, alteration and repair" of a house, at a certain rate by the day, is too indefinite to support a lien under *St.* 1852, *c.* 343, § 1, for the labor of the contractor and his workmen, and if thus alleged in the petition cannot be shown to have been more specific. *Wilder* v. *French*, 393.

MILL.

1. The use of a mill privilege purchased from the owner of a lower privilege on the same stream is not regulated by the use made of it before such purchase, but by what is reasonable and proper, conformably to the wants and usages of the community. *Haskins* v. *Haskins*, 390.
2. On a complaint upon the Rev. Sts. *c.* 116, the respondent, under a plea of the general issue, with a specification of defence that he has a right to keep his dam at the height complained of, cannot at the trial deny the complainants' title to the land flowed. *Tyler* v. *Mather*, 177.
3. On the trial of a complaint for flowing land, the declaration of a former owner of the dam, that a certain stone marked the height of his right to flow, is admissible in evidence for the complainant, without proof that such declaration did not refer to other land above the dam and below the land of the complainant. *Ib.*
4. On the trial of a complaint for flowing land, brought in 1850, the defence to which is prescription since 1823, evidence is not admissible that a former owner of the dam paid money in 1838 as damages for flowing land other than that of the complainant. *Ib.*
5. On the trial of a complaint for flowing land, brought in 1850, the defence to which was prescription since 1823, the complainant gave in evidence a deed made in 1837, of land above the dam, granting to the owner of the dam a right to flow the land to a certain height. *Held*, that the owner of the dam might show that the flowing mentioned in the deed was caused by raising the dam in 1823, and that annual damages had been paid therefor to the grantor from 1823 to 1830. *Ib.*
6. On the trial of a complaint for flowing land, the respondent may prove that a causeway above the dam and below the land flowed, by reason of having been raised since the commencement of the suit, operates as a dam. *Ib.*
7. On the trial of a complaint for flowing land, brought in 1850, the respondent contended that his dam had not been raised since 1823, and that he had a right to maintain it as it then stood; and the complainant contended that it had been raised since 1832. The court instructed the jury that if the dam had existed for any twenty years previously to the date of the complaint at the same height at which it then stood, they should find for him; but if it had not been maintained at said height for any twenty consecutive years previously to said date, they should find for the complainant; and no objection was made to the instructions at the time. *Held*, that the respondent had no ground of exception. *Ib.*

See ABATEMENT; DEED, 12; EVIDENCE, 15, 16; FLATS, 2.

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MONEY PAID.

See ACTION, 1.

MORTGAGE.

I. *Of Real Estate.*

1. A mortgage of land passes the grantor's title, though only in mortgage. *Murdock* v. *Chapman*, 156.
2. A mortgage described the land mortgaged as running westerly from a certain point a certain distance "to land of R., thence southerly at right angles by said R.'s land," &c. "being lots Nos. 3, 4, 5 and 6 on a plan" described and recorded, and the courses and distances on which corresponded to those in the deed. *Held*, that the four lots passed, though lot 5 was owned by R. and mortgaged to the grantor. *Ib.*
3. A mortgage, to secure advances to enable the mortgagor to erect a building, of "all his right, title and interest which he now has in the foundation or stone work of said building, and which he may have in and unto said building during its erection and completion and after it is completed," passes the land on which the building stands. *Greenwood* v. *Murdock*, 20.
4. A recorded assignment of "so much of a mortgage and property therein described as will amount to" a certain sum, less than the mortgage debt, passes no legal title against a subsequent purchaser from the mortgagee without actual notice of the assignment. *French* v. *Haskins*, 195.
5. An entry for foreclosure of a mortgage, under Rev. Sts. *c.* 107, § 2, duly certified and recorded, is sufficient, without notice to the mortgagor, or to a subsequent mortgagee, who is in possession under a previous entry for foreclosure; and is not waived or postponed by the first mortgagee's subsequently rendering an account to the owner of the equity of redemption, charging himself with rent beginning at a later period. *Hobbs* v. *Fuller*, 98.
6. A bond, given to the mortgagor by a mortgagee in possession just before his foreclosure is complete, conditioned to discharge the mortgage upon payment of the mortgage debt at a future day, before which the debt is paid and the mortgage discharged, prevents the foreclosure from taking effect. *Joslin* v. *Wyman*, 63.
7. The neglect of a mortgagee in possession to render to the mortgagor on demand an account of the amount due on the mortgage is no reason for extending the time of redemption. *Sanborn* v. *Dennis*, 208.
8. The provision of *St.* 1853, *c.* 316, that a suit in equity for the redemption of a mortgage, commenced by bill inserted in a writ, shall not be deemed to be commenced until service of the writ, is not affected by *Sts.* 1855, *c.* 194, and 1856, *c.* 38, defining the general equity jurisdiction of this court in cases of fraud, mortgages, accident and mistake. *Ib.*

See BOND, 2; EQUITY.

II. *Of Personal Property.*

9. A mortgagee of chattels cannot maintain an action against an officer for attaching them as the property of the mortgagor, without first making the de-

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mand required by Rev. Sts. c. 90, §§ 78, 79, and *St.* 1844, c. 148, although his mortgage provides that upon the property being attached he may take immediate possession. *Wing* v. *Bishop*, 223.

See TRUSTEE PROCESS; WRIT OF ENTRY, 2.

NAME.

See PLEADING, 1; REPLEVIN.

NOTICE.

Proof that written notice was given of the filing of interrogatories may be made without giving notice to produce said written notice. *Quinley* v. *Atkins*, 370.

See DEED, 4; WAY, 10.

NUISANCE.

I. *At Common Law.*

1. A laying out, by the proprietors of a canal, of a public landing place on its bank, pursuant to a statute, does not deprive them of the title in the land, or of the right to surround it with a wall on all sides except towards the canal, leaving a gate to be kept open at all seasons when the canal is navigable. *Huntington* v. *Proprietors of Locks & Canals*, 154.

II. *Under St.* 1855, c. 405, § 1.

2. An indictment for keeping a nuisance, in violation of *St.* 1855, c. 405, § 1, on a day named, "and on divers other days and times between that day and the day of the finding and presentment of this indictment," states the time with sufficient certainty. *Commonwealth* v. *Keefe*, 290.

3. An indictment on *St.* 1855, c. 404, § 1, which avers that the defendant kept and maintained a building for the illegal sale and keeping of intoxicating liquors on a day named "and on divers other days and times between that day and the day of finding this indictment," sufficiently charges a nuisance during the whole time. *Commonwealth* v. *Hoye*, 292.

4. An indictment on *St.* 1855, c. 405, for keeping "a certain building," used for the illegal sale and illegal keeping of intoxicating liquors, is not maintained by proof of occupying and keeping for that purpose one of several tenements in the same building. *Commonwealth* v. *McCaughey*, 296.

5. Upon the trial of an indictment on *St.* 1855, c. 405, § 1, for keeping a building used for the illegal sale and keeping of intoxicating liquors, the only evidence was that the occupant of the house and servants of the defendant sold liquor there. The court refused to rule that this evidence was insufficient; and merely instructed the jury that it was a question of fact for them to decide. *Held*, that the defendant's exceptions must be sustained. *Commonwealth* v. *Dunbar*, 298.

6. Upon the trial of an indictment under *St.* 1855, c. 405, for keeping and maintaining a building for the illegal sale and keeping of intoxicating liquors, it

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appeared that the building contained a front shop where groceries only were sold, and a back shop where liquors were sold; many sales of liquor and other articles were shown to have been made, but none by the defendant, except once of some oats in the front shop; it appeared that the same person sold groceries in the front and liquor in the back shop; the defendant was often in the front shop, but was not proved to have been behind the counter nor to have been in the back shop but once, when he went with a constable who had come to the building with a warrant to arrest another person, and told that person to go with the constable before the justice, and went with them, and told the justice who issued the warrant that he had half a dozen more boys; and afterwards told a constable that another person sought was not in the back shop, but he might look for him there if he wished. *Held*, that there was sufficient evidence to be submitted to the jury. *Commonwealth* v. *Hoye*, 292.

OFFICER.

1. Marshals appointed under a city ordinance which directs that they shall also be appointed constables, and that marshals shall pay over to the city the fees received by them in criminal cases or in the service of the city, and shall have salaries in full for all their services, are liable for such fees received by them as constables. *City of Worcester* v. *Walker*, 78.
2. A city ordinance giving police officers a fixed salary, and requiring them to pay over to the city the fees received by them as witnesses, or as penalties in criminal cases, or for service of any criminal process, or for any services in behalf of the city, is not contrary to public policy. *Ib.*

See SPIRITUOUS AND INTOXICATING LIQUORS, 9; TAX, 3.

PARENT AND CHILD.

See APPRENTICE.

PARTIES TO ACTIONS.

See PLEADING, I; WITNESS, 1–5.

PARTNERSHIP.

1. A partner, who has made a promissory note to the partnership as evidence of the amount drawn out of the firm by him, and afterwards, upon dissolution of the partnership, assigned all his interest in the property and debts of the firm to his copartner, is not liable to an action on the note by the latter, who has taken the note by indorsement from the partnership when overdue, and with notice of the facts. *Stoddard* v. *Wood*, 90.
2. Evidence that legal services were rendered in the joint names of an attorney at law and another person is not sufficient to prove a partnership between them, and thus defeat an action for such services brought by the attorney alone. *Bishop* v. *Hall*, 430.

See EVIDENCE, 19; INSOLVENT DEBTOR, 6.

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PAUPER.

If money paid by the Commonwealth for the support of a lunatic at the State lunatic hospital, on the mistaken supposition that he had no settlement within the Commonwealth, is retained by the Commonwealth, on discovery of the mistake, out of money due to the hospital, the treasurer of the hospital may recover, under Rev. Sts. c. 48, § 9, and St. 1837, c. 226, § 7, from the town in which the lunatic resided at the time of his commitment, unless the defendant proves that he had no settlement in the Commonwealth, for such support during the six years previous to the commencement of the action, and for that only. *Jennison* v. *City of Roxbury*, 32.

PAYMENT.

A letter containing money, sent by a debtor to his creditor through the post office, is at the risk of the debtor, unless that mode of remittance is authorized by the creditor, either by express direction or by the usual course of dealing between the parties. *Gurney* v. *Howe*, 404.

See INSOLVENT DEBTOR, 10; PRINCIPAL AND AGENT, 5.

PERJURY.

An indictment for perjury by testifying, upon the trial of a complaint for an assault upon this defendant, that the person complained of did not assault him on a day named, whereas in fact, as this indictment alleged, he did so assault him on that day, is not supported by evidence that this defendant testified as alleged, and that he was so assaulted either on the day named or the day before. *Commonwealth* v. *Monahan*, 119.

PLAN.

See DEED, 8–10; MORTGAGE, 2.

PLEADING.

I. *Parties to Actions.*

See CONTRACT, 4; HUSBAND AND WIFE, 3; INFORMATION; SLANDER; TRUST.

II. *Writ and Declaration.*

1. Whether describing the plaintiff in a writ by no other Christian name than "H." is bad on demurrer — *quære*. *Sistermans* v. *Field*, 331.

2. A declaration, which alleges that the defendant made a promissory note to his own order, and indorsed it in blank, and owes the plaintiff the amount of it and interest, is bad on demurrer, for want of any statement of the plaintiff's interest. *Ib.*

3. Under the practice act, St. 1852, c. 312, § 2, a declaration in tort for breaking and entering a close need not contain any averment of time. *Knapp* v. *Slocumb*, 73.

See RECOGNIZANCE; WORK AND LABOR.

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III. *Answer, &c.*

4. A motion to dismiss an action in the court of common pleas, for the refusal of the justice of the peace before whom it has been commenced to order a jury, cannot be entertained after the first term, even if a similar motion has been made before the justice. *Trees* v. *Rushworth*, 47.
5. Under Rev. Sts. *c.* 85, §§ 11, 12, an entry in a record of a justice of the peace, that the "defendant appears and pleads orally and says he is not guilty," is a joinder of issue, and the defendant may give in evidence any matter admissible under any general or special plea in bar; and if the case is carried by appeal to the court of common pleas, and no further pleading is ordered, the same evidence is admissible there, as would have been in the court below. *Wilbur* v. *Taber*, 361.
6. To a declaration averring a waiver of a bar from lapse of time, a denial of such waiver is a sufficient answer, without more distinctly setting up the bar. *Vogel* v. *People's Mutual Fire Ins. Co.* 23.
7. To a declaration which avers the making of a promissory note by the defendant, payable to the plaintiff, and that the defendant owes him the amount of said note, an answer that the defendant does not owe the plaintiff in manner and form declared on, and leaving him to prove the same, does not put the signature in issue. *Framingham Bank* v. *Gay*, 241.
8. In an action of tort for breaking and entering a close and removing a fence, the defendant, under an answer which only denies the breaking and entering, cannot disprove the removal of the fence. *Knapp* v. *Slocumb*, 73.
9. Under the practice act, *St.* 1852, *c.* 312, §§ 14, 26, a defendant who answers that he can neither admit nor deny, but leaves the plaintiff to prove the allegations in the declaration, may introduce evidence to rebut the plaintiff's case. *Ib.*

See LANDLORD AND TENANT, 3; MILL, 2; USURY; WRIT OF ENTRY, 1.

POLICE COURT.

The *St.* of 1838, *c.* 147, § 2, authorizing any police court to appoint a clerk, extends to a police court established since, even if by the act establishing it the clerk's duties are imposed on the justice. *Commonwealth* v. *Gilland*, 3.

PONDS.

Grants of, and rights in. *Note*, 528.

POST OFFICE.

See EVIDENCE, 8, 9; PAYMENT.

PRINCIPAL AND AGENT.

1. A committee empowered by vote of a corporation to authorize their treasurer to convey real estate may transmit such authority orally. *Hutchins* v. *Byrnes*, 367.

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2. An auctioneer has no authority to bind an administrator personally, by a warranty of the condition of goods of the intestate. *Blood* v. *French*, 197.

3. One who uses a carriage, hired in his name by another without previous authority or subsequent ratification, without reasonable cause to believe that the carriage was hired on his account, or that he was looked to for pay for its use, is not liable for its use, although the owner had no notice that the hirer procured it on his own account. *Adams* v. *Bourne*, 100.

4. In an action by R. against D. for the keeping of a horse, which was defended on the ground that T. was R.'s debtor, the judge instructed the jury that if R.'s servant, with whom the horse was originally left, "understood that the horse was there for T., as T.'s horse and at his charge, and that T. was to pay for the keeping, R. could not recover;" and declined to instruct them that "if D. by himself or his agent left the horse at R.'s stable, R. could recover, unless D. notified him to look to T. for pay, and R. agreed to look to T. for pay. *Held*, that R. had no ground of exception. *Randall* v. *Doane*, 408.

5. In an action against a corporation on a debt, the defence was payment; and it appeared that the president of the corporation took the bill receipted from the creditor to get the money from their treasurer, and gave the bill to the treasurer, who made a correction in it, and handed it with the money back to the president, who lost them. The defendants contended that their president acted as the creditor's agent; and asked that the jury be instructed "that the circumstance that the treasurer, after correcting and paying the bill, lent the receipt, to be returned after showing the same, did not prevent the antecedent acts from constituting a legal payment." But the judge, without thus instructing the jury, instructed them as to the respective duties of a president and treasurer of a corporation, and that it was for the jury to say not upon any particular portion of the proof, but upon all the evidence, for whom the president was acting. *Held*, that the defendants had no ground of exception. *Wright* v. *Old Colony & Fall River Railroad*, 413.

See DEED, 2; EMBEZZLEMENT; INTEREST, 2.

PROMISSORY NOTE.

1. A promissory note payable "four months after, for value received," is payable four months after date. *Pearson* v. *Stoddard*, 199.

2. In an action on a promissory note payable to S. or order, signed on the back by S., and, below that, by W., with "waiving demand and notice" written over the name of each, oral evidence is admissible to show that W. signed the note before its delivery to S., and is therefore liable as an original promisor; and the admission of evidence that S. refused to take the note, unless the maker "would get another name to be responsible to him on it," is immaterial and no ground of exception. *Ib.*

3. Parol evidence is inadmissible, even between the original parties to a promissory note, to show that a person whose name is signed on the back of the note, not the payee, signed it as guarantor only, or upon a condition which has not been performed. *Wright* v. *Morse*, 337.

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4. A negotiable promissory note, given for intoxicating liquors sold in this commonwealth, contrary to *St.* 1852, *c.* 322, is valid in the hands of one who took it before maturity, for a valuable consideration, and without notice of the illegality, notwithstanding the provision of § 19 of that statute, declaring that all payments and compensations for intoxicating liquors illegally sold "shall be deemed to be received in violation of law, without consideration, against law, equity and good conscience." *Cazet* v. *Field*, 329.

5. Upon proof that a promissory note is founded on illegality, or obtained or put in circulation fraudulently, an indorsee, before he can recover upon it, must show that he gave value for it. *Sistermans* v. *Field*, 331.

6. In an action on a promissory note given in consideration of a warranty deed of land, the defendant cannot introduce parol evidence that other land was previously agreed to be conveyed to him, not covered by the description in the deed, and from which he was afterwards evicted. *Bennett* v. *Ryan*, 204.

7. The indorsee of a promissory note, upon receiving a partial payment from the maker, agreed not to sue him for the balance, and subsequently transferred the note to H. H. sued the indorser for the balance, and attached his real estate; and he, pending the suit, conveyed said estate to W., taking back an agreement to save him harmless from the suit. H. recovered judgment for the balance of the note, and levied on the estate; and transferred the judgment and the estate levied on to B., who agreed with the maker to obtain for him a discharge of all liability upon the note. *Held*, that the indorser could recover of the maker the amount which he had been obliged to pay; and that evidence of the nature and consideration of the conveyance by him to W., and that W. had no knowledge of the attachment, was immaterial, and its exclusion no ground of exception. *Nichols* v. *Holt*, 202.

8. It is no defence to an action by the payee on a negotiable promissory note, that the plaintiff had pledged it to a third person as collateral security for a debt of which he had since tendered payment, which the pledgee refused to receive or to give up the note. *Wolcott* v. *Boston Faucet Co.* 376.

See FORGERY; HUSBAND AND WIFE, 3; INSOLVENT DEBTOR, 5; PARTNERSHIP, 1; PLEADING, 2, 8.

QUO WARRANTO.

See COLONY CHARTER.

RAILROAD.

1. One railroad corporation leased its railroad to another, who agreed to equip it with engines, cars and other furniture, and to give as favorable accommodation to its business as if they owned it, and to run regular trains, and also extra trains when required, for which last they should be allowed "the actual cost of running the same;" and it was agreed that the lessees should collect the revenues of the road leased, and, before paying them to the lessors, take out a certain sum semiannually for running the trains over their road, and a certain proportion of the balance, for the use of their own road by such trains. *Held*

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that the "actual cost" of the extra trains included only money actually paid out, and not a proportion of the expense of the lessees' road, or of the wear and tear of their track. *Lexington & West Cambridge Railroad v. Fitchburg Railroad*, 226.

2. *Held, also*, that the lessees were bound to transport without extra charge wood and coal intended for and used upon that part of a brick yard at the junction of the two roads, which bordered on the road leased, and which were drawn over the lessees' road, and over a side track built by agreement between the two corporations and in part within the location of that road. *Ib.*

3. *Held, further*, that a further agreement for an additional allowance to the lessees for certain freight for a specified time, having been (as was found by an auditor) "continued by mutual consent" until a later date, did not entitle the lessees after that date to any compensation beyond that stated in the original agreement. *Ib.*

See CARRIER; CORPORATION, 1.

REAL ACTION.

See INFORMATION; WRIT OF ENTRY.

RECEIPTOR.

1. A receiptor agreed to keep chattels attached on mesne process until the attaching officer should call for them, and then deliver them to him, and further agreed to indemnify the officer against "all costs, trouble or expense that shall arise to him through any default in consequence of his entrusting said property in my hands." The receiptor delivered the chattels to the owner, who disposed of them, and the officer, upon a demand made upon him within thirty days after judgment, was obliged to satisfy the execution. *Held*, that the receiptor was liable to him, upon a demand made after the expiration of the thirty days. *Colwell v. Richards*, 374.

2. In an action by an attaching officer against a receiptor, the burden of proving that the property did not belong to the person as whose it was attached is upon the defendant. *Burt v. Perkins*, 317.

3. An action by an attaching officer upon a receipt for certain property attached on mesne process, by which the receiptor agrees to keep and redeliver the property to the officer on demand, may be defeated by proof that it was not the property of the person as whose it was attached. *Ib.*

RECOGNIZANCE.

In an action on a recognizance to prosecute an appeal, it must be alleged and proved that the recognizance has been returned into the appellate court. *Patterson v. Godsmith*, 258.

REPLEVIN.

Replevin does not lie for property attached on a writ served upon the plaintiff, although he is misdescribed therein and has pleaded in abatement thereof; and

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cannot be supported by evidence that he did not make the contract therein declared on. *Perry* v. *Richardson*, 216.

RETURN.

See ACTION, 5; TAX, 3.

ROXBURY.

See GRANT, 2.

SALE.

A person who by the form of a sale fraudulently obtains possession of chattels, with intent never to pay for them, has no property which his attaching creditor can hold against the vendor. *Wiggin* v. *Day*, 97.

See INSURANCE, 2.

SCHOOL DISTRICT.

See TAX, 4.

SEASHORE.

See FLATS; GRANT; SEAWEED; STATUTE, 3; TOWN.

SEAWEED,

Rights of property in. *Note*, 527.

SENTENCE.

See LARCENY, 5.

SERVICE.

See WRIT.

SET-OFF.

A judgment rendered twenty years ago, and recently made up by permission of the court, may be allowed to be set off in an action commenced many years after said judgment and before the completion of the record. *Parker* v. *Rugg*, 209.

SLANDER.

1. In a declaration for slander, the *St.* of 1852, c. 312, has not dispensed with the necessity of averring the facts and circumstances which render actionable words not themselves so. *Tebbetts* v. *Goding*, 254.
2. A declaration for slander, which alleges that T. the plaintiff owned a certain building; that said building was insured and burned, "and that afterwards the defendant publicly, falsely and maliciously accused the plaintiff of wilfully and maliciously burning the said building, with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: 'T. burned the mill himself,'" is bad, because it does not charge the defendant with any crime. *Ib.*

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SPIRITUOUS AND INTOXICATING LIQUORS.

1. An indictment on *St.* 1855, *c.* 215, § 15, for an unlawful sale of "intoxicating liquor" need not more particularly describe the kind of liquor sold. *Commonwealth* v. *Ryan*, 137.

2. On the trial of an indictment on *St.* 1855, *c.* 215, for unlawfully selling intoxicating liquors, the burden of proving any license, appointment or right to sell, is upon the defendant, by virtue of *St.* 1844, *c.* 102. *Ib.*

3. A complaint, which avers, in the form prescribed by *St.* 1855, *c.* 397, that the defendant "did keep intoxicating liquor with intent to sell the same in this commonwealth, he not being authorized to sell," &c., charges substantially and formally, within the twelfth article of the Declaration of Rights, a keeping of such liquor with intent to sell, in violation of *St.* 1855, *c.* 215, § 24. *Commonwealth* v. *Gilland*, 3.

4. The provision of *St.* 1855, *c.* 215, § 17, that three several sales of spirituous or intoxicating liquor shall be sufficient evidence of a violation of this section, is constitutional and valid, and subjects a person making three such sales to the penalties of a common seller. *Commonwealth* v. *Burns*, 132.

5. An indictment, which avers that the defendant at a certain place on a certain day, and at said place from said day to the day of finding the indictment, "was then and there a common seller of intoxicating liquors," charges but one offence. *Commonwealth* v. *Woods*, 131.

6. An indictment on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors, is not supported by evidence of sales of beer, without evidence that it was "strong beer" or "lager beer." *Commonwealth* v. *Hardiman*, 136.

7. An indictment for being a common seller of "intoxicating liquors, and mixed liquors, part of which is intoxicating," is supported by proof of three sales of intoxicating liquors, and none of mixed liquors. *Commonwealth* v. *Burns*, 287.

8. A complaint, which avers that the defendant "at Blackstone in the county of Worcester did convey from place to place within said commonwealth intoxicating liquor," in violation of *St.* 1855, *c.* 215, § 20, does not sufficiently state the places from which and to which the liquor was conveyed. *Commonwealth* v. *Reily*, 1.

9. An officer seizing intoxicating liquors by a warrant issued under *St.* 1855, *c.* 215, § 25, is liable as a trespasser, upon the subsequent abatement of the proceedings because the notice to the keeper was not returned to the proper court; although no order is passed for the return of the liquors, and notwithstanding § 38. *Ewings* v. *Walker*, 95.

10. On the trial of an indictment for being a common seller of intoxicating liquors and for single unlawful sales, the district attorney was allowed, against the defendant's objection, to ask a witness who had testified to a single sale to himself, whether he had not previously said that the defendant had made three sales to him. *Held*, that subsequently abandoning the count for being a common seller took away all right of exception. *Commonwealth* v. *Lincoln*, 288.

11. On the trial of an indictment for unlawfully selling intoxicating liquor, evi-

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dence that there were implements and materials for selling liquor in the defendant's shop is competent. *Ib.*

See ATTORNEY AND COUNSEL; BOND, 1; COMPLAINT, 2; EVIDENCE, 1–4; LARCENY, 1; NUISANCE, I.; PROMISSORY NOTE, 4.

STATUTE.

1. Punctuation is not to be regarded in construing a statute. *Cushing* v. *Worrick*, 382.
2. In the construction of statutes, a limiting clause is to be restrained to the last antecedent, unless the subject matter requires a different construction. *Ib.*
3. After a dispute of some years' duration between a town and the proprietors of common lands therein, about the rights of taking seaweed from the shores and of feeding cattle on the lands, the legislature, upon the petition of said proprietors, and with the consent of the town, incorporated the proprietors by an act which defined the bounds of their lands, authorized them to erect certain gates and water fences at the ends thereof, and provided that the town should "be at the expense of the aforesaid gates and water fences," and "reserved to the town the privilege of the shores, and of feeding all lands, not comprehended within the aforementioned bounds." *Held*, that the town's privilege of the shores extended to those comprehended within said bounds, and was not forfeited by ceasing to maintain the gates and water fences. *Ib.*
4. Early codes of in Massachusetts Colony. *Note*, 513, 514.
5. Colonial, not repealed by judgment against the Charter in 1684. *Note*, 517, 518

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TAX.

1. Under the Rev. Sts. c. 7, § 27, one sixth of a state tax must be assessed on polls, although, if added to the town and county tax, it brings the poll tax on each individual above one dollar and a half. And if the tax is not so assessed, the whole assessment is void. *Goodrich* v. *Inhabitants of Lunenburg*, 38. [But see *St.* 1859, *c.* 118.]
2. A nonresident owner of real estate may be arrested for nonpayment of taxes thereon, after due demand upon him, and failure of the officer upon diligent search to find any goods belonging to him or on the estate. *Snow* v. *Clark*, 190.
3. An officer, who returns upon a warrant for the collection of a tax assessed upon real estate to a nonresident owner thereof, that, "having made diligent search for goods of" the said owner "and for goods upon the said real estate, whereon to levy this warrant," he arrested the said owner, does not make himself liable as a trespasser, by not more distinctly stating that he was unable to find such goods. *Ib.*
4. A person residing in one town and carrying on his trade in another town, where he hires a shop, is not liable to be assessed on his stock in trade for money raised to build a school-house in the district where he resides, under Rev. Sts. *c.* 7, § 10, and *c.* 23, § 33. *Bates* v. *School District in Weymouth*, 433.

See DOMICIL.

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TELEGRAPH.

See WAY, 11.

TENANT IN COMMON.

See DISSEISIN, 2; INDICTMENT.

TIME.

See COMPLAINT, 1; NUISANCE, 2, 3; PERJURY; PLEADING, 3.

TOWN.

1. A committee appointed to settle the boundary between two towns, in a report, which was accepted by both towns, defined a line by bounds, courses and distances, and added, "Some deviations from the original or natural boundary and some exchanges of territory are involved; and consequently it is supposed that the sanction of the legislature will be necessary to render valid the arrangement agreed to." The legislature afterwards passed an act declaring that the lines thus defined "should constitute and be considered the boundary lines between the said towns, and the territory and jurisdiction on either side of said line as hereby established are accordingly confirmed to said towns respectively." *Held*, that neither the agreement of the towns nor the act of the legislature affected the title of the Commonwealth to the seashore within one of the towns. *Commonwealth* v. *City of Roxbury*, 451.
2. Origin and powers of towns in Massachusetts. *Note*, 510, 511.

See ACTION, 1; EVIDENCE, 18; WAY, 4, 11.

TRESPASS.

See ACTION, 3, 4; EXCEPTIONS, 12; HUSBAND AND WIFE, 4; SPIRITUOUS AND INTOXICATING LIQUORS, 9; TAX, 3.

TROVER.

See ACTION, 4; EXCEPTIONS, 12.

TRUST.

See CONSTITUTIONAL LAW; EQUITY, 2.

TRUSTEE PROCESS.

A writ against a mortgagor in possession, and against the mortgagee as his trustee, under *St.* 1844, *c.* 148, § 2, must be served by copy on the principal defendant, like other trustee processes. *Kent* v. *Lee*, 45.

See APPEAL.

USAGE.

See EVIDENCE, 13.

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USURY.

An answer by an indorser to an action on a promissory note does not sufficiently aver usury by averring that "the plaintiff reserved a greater rate of interest than is allowed by law, at the time of discounting said note for the defendant, to wit," a certain sum. *Clarke* v. *Hastings*, 64.

VARIANCE.

See INDICTMENT; PERJURY; SPIRITUOUS AND INTOXICATING LIQUORS, 6.

WAIVER.

See INSURANCE, 7; MORTGAGE, 5, 6; PLEADING, 6.

WARRANT.

1. The provision of the Rev. Sts. *c.* 135, § 2, that a warrant issued for the arrest of a criminal shall recite the substance of the accusation, is complied with by making the warrant on the same paper with the complaint, and definitely referring to it. *Commonwealth* v. *Dean & Hoye*, 283.

2. *It seems*, that an objection to the form of a warrant issued upon a complaint made to a justice of the peace, though taken before the justice, is waived by not renewing it at the first opportunity in the court of common pleas on appeal. *Ib.*

See FUGITIVE FROM JUSTICE; WAY, 6.

WATERCOURSE.

See DEED, 11, 12.

WAY.

1. A right of way of necessity ceases on acquiring another right of way over the land of its owner to the same highway, and is not revived by conveying away that land. *Baker* v. *Crosby*, 421.

2. Evidence that for more than twenty years there has been a well defined travelled way, with ruts visible in some parts, though not so worn by travel as to prevent the growth of grass, leading from the gate of a house lot across a meeting-house green to the highway, with no other ready and convenient access to the house, is sufficient evidence of a way by prescription to be submitted to a jury. *Ib.*

3. A petition, presented to the board of aldermen of a city for the location of a new road, was referred to the usual committee, who reported in its favor with an order requesting the superintendent of streets to lay out the road agreeably to the petition, by putting down metes and bounds, and to report to the board, which he did. The mayor and aldermen went upon the ground, in compliance with an order instructing the city clerk to so notify the owners of the land over which the road was supposed to run; examined the metes and bounds; found that they were correct, and that no one was present to object to the laying out except claimants of damages; and recommended the adoption of an

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order accepting the road as a highway, which order was referred to a joint committee of the city council, and on their report passed, locating the way by metes and bounds, but in one portion "allowing for necessary curves between the monuments placed by the superintendent of streets." The road was constructed accordingly, with some alterations made by agreement with abutters. More than a year afterwards, the board of aldermen, without any new petition being filed, ordered the superintendent of streets to make an additional return in conformity with those alterations, and he made a return following the line of the road as constructed, and the board of aldermen passed an order accepting that road as a highway. *Held*, that a petition for damages by an owner of land not affected by the alterations should have been presented within a year from the original laying out. *Haskell* v. *County Commissioners*, 341.

4. A city that has taken land and actually constructed a highway over it, cannot object that no notice was given of the purpose to locate the way; or that the names of the owners of the land were not stated in the laying out. *Ib.*

5. The mayor and aldermen of a city, upon a petition for the assessment of damages by the raising of a street in front of the petitioner's house, accepted the report of a committee recommending that no damages should be allowed to the petitioner, but that the street should be lowered in front of the land, "so that said house shall stand relatively to the street as it did before the alteration now complained of, providing any action in the case is necessary." Three months afterwards, the mayor and aldermen, upon a request of the petitioner to act on his petition, voted to meet at the premises to view them, but took no further action in the matter. *Held*, that the acceptance of the report was a judgment against the petitioner's claim for damages; and that this judgment was not waived or modified by the subsequent action of the board. *Goddard* v. *Mayor & Aldermen of Worcester*, 88.

6. The board of aldermen of a city laid out and accepted a public highway, awarded damages to landowners, and fixed a time for them to remove buildings. A landowner appealed from the award of the board of aldermen to the county commissioners, and obtained a new award of damages from a jury, whose verdict was accepted by the court of common pleas. The order for the removal of buildings had been previously revoked and due notice given of such revocation, and the order accepting the street was afterwards also revoked, before any entry was made upon the land or possession thereof taken for the purpose of constructing the highway. *Held*, that under *Sts.* 1842, *c.* 86, and 1847, *c.* 259, the landowner was not entitled to a warrant of distress for the damages given by the jury, and that an order of the county commissioners issuing such a warrant should be quashed on certiorari. *City of New Bedford* v. *County Commissioners*, 346.

7. *It seems*, that a laying out of a highway, in terms as an alteration of a former way, discontinues the old way between the ends of the new one. But in the absence of any record of the laying out of either way, evidence of the construction and subsequent repair of the new way by public authority does not necessarily presuppose the discontinuance of the old one. *Johnson* v. *Wyman*, 186.

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8. A writ of *certiorari* will not be issued to correct the proceedings of county commissioners, who, after having adjudged that a road should be constructed, and having laid it out over a portion of the route proposed, have rescinded their adjudication on the ground that public necessity does not require the construction of the road over the remainder of the route. *Thorpe* v. *County Commissioners*, 57.

9. *It seems*, that an adjudication of county commissioners that public convenience requires a road to be laid out, may be rescinded by them at any time before the location of the road. *Ib.*

10. On a petition to county commissioners to rescind an adjudication that public necessity requires the construction of a road, no special notice need be given to the original petitioners for the road, if the road has been partially laid out; but service of copies of the petition to rescind on the town clerks of the towns in which the road is situated, and by posting copies of the petition in two public places of each of said towns is sufficient. *Ib.*

11. A town is not liable for damages sustained by a traveller upon a highway by reason of a telegraph post erected within the limits of the highway by an electric telegraph company, in a place prescribed by the selectmen of the town, under *St.* 1849, *c.* 93, § 3. *Young* v. *Inhabitants of Yarmouth*, 386.

12. While B. was in the act of occupying a public square with his wagon, A. passed by with his carriage, and occupied part of the same square, and a collision ensued, by which A. was injured. *Held*, that if A. used due care and diligence, and B. did not, A. could recover damages of B. *Lane* v. *Bryant*, 245.

See DEED, 5–10; EVIDENCE, 12; LANDING PLACE.

WIDOW.

Under *Sts.* 1854, *cc.* 406, 428, the widow of one who leaves no children, if she waives the provision made for her in the will, is entitled to the whole of the personal property, if it does not exceed five thousand dollars. *Brigham* v. *Maynard*, 81.

WILL.

1. The word "estate," in a will made before the Rev. Sts. *c.* 62, § 4, although accompanied by words of locality, passed a fee, unless controlled by other parts of the will. *Leland* v. *Adams*, 171.

2. A fee passed by the following devise, made before the Rev. Sts., although words of inheritance were annexed to other devises in the same will — "To A. I give and devise all my lands and tenements in W., with the privileges and appurtenances to the same belonging, containing four hundred acres, be the same more or less. This estate was formerly the property of G., and I now devise it as a token of my respect for the devisee, and in consideration of his services in directing the education of my two grandsons." *Ib.*

3. A testator devised to his daughter H. one third part of a certain farm, "but if my executor shall think best to sell said farm, then I give to her one third

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part of the proceeds of the sale of said farm;" to his daughter S. one third part of the same farm, "or if said farm is sold, then one third part of the proceeds of the sale of said farm;" and, after a devise to his daughter A. in the same words as to S., added, "And I hereby authorize my executor to sell and pass deeds to convey said farm in such manner as he may think best for all concerned; and divide the proceeds as above directed; but if he should think best not to sell the same, then they may take the farm." After the making of his will, the testator in his lifetime sold the farm. *Held*, that S. was entitled to one third of the proceeds of such sale. *Clark* v. *Packard*, 417

WITNESS.

1. A wife was not a competent witness under *Sts.* 1852, *c.* 312, § 60, and 1856, *c.* 188, nor, *it seems*, under *St.* 1857, *c.* 305, in an action to which her husband was a party; unless she was also one of the parties to the action. *Barber* v. *Goddard*, 71. *Ray* v. *Smith*, 141.
2. Under *St.* 1856, *c.* 188, a wife was a competent witness in support of an action brought by her husband and herself jointly for a personal injury to her. *Snell* v. *Inhabitants of Westport*, 321.
3. An administrator is a competent witness under *St.* 1856, *c.* 188, in an action on a contract made by himself as such. *Blood* v. *French*, 197.
4. In replevin of goods, to which the defendant pleads title as assignee in insolvency of one now deceased, the plaintiff is not a competent witness, under *St.* 1857, *c.* 305, to prove that the goods were fraudulently obtained from him by the deceased. *Fischer* v. *Morse*, 440.
5. Under *St.* 1857, *c.* 305, the complainant in a bastardy process is a competent witness for all purposes, including the fact of her having accused the respondent in the time of her travail. *Murphy* v. *Spence*, 399.
6. An officer of a voluntary association, who has testified to what he knows of its expenses and management, cannot, for the purpose of refreshing his recollection, be shown an account book of the association, the entries in which he did not make, and does not know who did. *Davis* v. *Allen*, 322.

WORK AND LABOR.

A count for work and labor, with a bill of particulars, some items of which bear date more than six years before the commencement of the action, may be maintained for the full amount, notwithstanding the statute of limitations, if the whole work has been done under an entire contract. *Hall* v. *Wood*, 60.

See INTEREST, 1; MECHANICS' LIEN.

WRIT.

Service of a writ by attaching real estate, and leaving a summons at the last and usual place of abode, of a defendant who is out of the Commonwealth, and not a resident thereof, is not sufficient to warrant a judgment against him, without further notice according to the Rev. Sts. *c.* 92, § 3. *Packard* v. *Mathews*, 311.

See JURISDICTION; MORTGAGE, 8; PLEADING, 1; TRUSTEE PROCESS; WRIT OF ENTRY, 8.

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WRIT OF ENTRY.

1. On a writ of entry to recover three lots of land, the tenant pleaded the general issue with a specification of title in himself to the first lot; the demandant proved the conveyance of the three lots to himself, and showed a title in his grantor to the first and second lots, but none to the third. *Held*, that the demandant was entitled to recover the third lot, the tenant showing no title thereto. *Mara* v. *Pierce*, 306.

2. A writ of entry is sustained by proof of a mortgage to the demandant, an entry for foreclosure thereof, and a quitclaim deed to him of the equity of redemption before such entry for foreclosure, if the tenant relies on a title derived from the mortgagor since such entry. *Whitcomb* v. *Jacobs*, 255.

3 Service of a writ of entry, brought against a spendthrift, upon him and his guardian, and a general appearance of counsel for the defence, will support a judgment for the demandant. *Ib.*

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY

HORACE GRAY, JR.

VOLUME X.

BOSTON:
LITTLE, BROWN AND COMPANY.
1883.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. GEORGE T. BIGELOW,
HON. BENJAMIN F. THOMAS.
HON. PLINY MERRICK.

ATTORNEY GENERAL.

HON. JOHN H. CLIFFORD.
(Term of office expired January 20th 1858.)
HON. STEPHEN H. PHILLIPS.
(Qualified January 20th 1858.)

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF ESSEX, NOVEMBER TERM 1857, AT SALEM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. BENJAMIN F. THOMAS,
HON. PLINY MERRICK,
} JUSTICES.

COMMONWEALTH *vs.* HENRY MURPHY.

Upon the trial of an indictment on *St.* 1855, *c.* 215, §§ 15, 17, for selling intoxicating liquors "without having any license, appointment or authority therefor," the Commonwealth need not prove that the defendant did not when that statute took effect own the liquors sold by him.

The fifteenth and seventeenth sections of the *St.* 1855, *c.* 215, are constitutional and valid.

The refusal of the judge presiding at a criminal trial to allow the defendant's counsel to read to the jury an adjudication by the highest court of another state that a statute like that upon which this prosecution is founded is contrary to the constitution of that state is no ground of exception.

INDICTMENT on *St.* 1855, *c.* 215, §§ 15, 17, for selling intoxicating liquors "without having any license, appointment or authority therefor." At the trial in the court of common pleas

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before *Perkins*, J. there was evidence that the defendant sold intoxicating liquors as alleged, but no evidence whether he did or did not own those liquors at the time of the passage of the statute upon which he was indicted. The defendant requested the judge to rule:

"1st. That the law of 1855, prohibiting the sale of spirituous and intoxicating liquors, so far as it applies to liquor which at the time of its enactment was in the hands of the defendant as his property, is unconstitutional and void.

"2d. That the government in order to obtain a conviction under this indictment must allege and show that the liquor sold by the defendant was not lawfully his property at the time of the enactment of said statute.

"3d. That the legislature has no authority to deprive an individual of property, and the right of sale and other rights which attach to it, except in the manner provided by the Constitution, viz. by making a proper compensation."

But the judge ruled that the law was constitutional so far as the present indictment was concerned, notwithstanding these objections.

The defendant offered to show that the highest court of judicature of the State of New York had decided a law precisely like this statute of 1855 to be unconstitutional, and in contravention of the principles of the common law of the land, by introducing and reading to the jury the third volume of Kernan's New York Reports, which, as the attorney for the Commonwealth admitted, contained the decisions of said court. [*Wynehamer* v. *People*, 3 Kernan, 378.] But the judge refused to permit it to be read to the jury.

The defendant being convicted, alleged exceptions.

W. D. Northend & *G. F. Choate*, (*E. W. Kimball* with them,) for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Shaw, C. J. This is an indictment on the 15th and 17th sections of the liquor law of 1855.

1. The defendant contended that so far as the offence charged consisted of selling liquor which the defendant owned before

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the statute of 1855, it was unconstitutional and void; and that the burden of proof was on the prosecution to prove that the liquor sold was not so owned by the defendant at the time the law took effect. The court declined. We think the refusal was right. The indictment charged that the defendant sold liquor "without any license, appointment or authority therefor." Upon this it has been repeatedly held, that if the defendant had any authority, it was matter of defence, and the burden of proof was on him. *Commonwealth* v. *Ryan*, 9 Gray, 139, and cases there cited.

Besides, the direction asked for was founded on a hypothetical case, without any proof. If it would be a good defence, the defendant must prove or offer to show that he did so own it; whether this would be a good defence we give no opinion, because no such offer was made.

2. The court therefore was right in ruling that the law in the 15th and 17th sections was constitutional. In fact these are little more than the reënactment of provisions long in force.

3. Another exception is that the judge prohibited the counsel for the defendant from reading an adjudication of the court of appeals of the State of New York, declaring a statute of somewhat similar character unconstitutional and void. This was purely a local decision, on a different constitution, a different statute, and all merely local, of no force here. Without laying down any general rule respecting the reading of books on a trial, the court are of opinion that this was rightly rejected.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN ROCK.

Since the *St.* of 1855, c. 152, as well as before, the jury in a criminal case are to be governed by the instructions of the court in matter of law.

One indicted on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors, cannot except to a refusal of the presiding judge to rule that, if that statute provides for a trial contrary to the course and usage of the common law, it is unconstitutional and no verdict should be found under it.

INDICTMENT on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors. Trial in the court of common pleas before *Bishop*, J., who allowed this bill of exceptions:

"The defendant's counsel requested the court to instruct the jury that they (the jury) are not in their decision upon the law necessarily to be governed by the opinion of the judge presiding at the trial; and further that this law under which this indictment is found, if it provides for a trial contrary to the course and usage of the common law, is unconstitutional and no verdict is to be found under it.

"But the court declined so to instruct the jury; and instructed them on the first point, that in their deliberations they were to be governed by the law as stated to them by the court, and that it was their province to apply the law so stated to the facts proved on the trial, and to decide upon the whole case whether the offence charged was or was not proved beyond a reasonable doubt.

"Upon the second point the court declined to give any instructions to the jury upon the ground that the instructions prayed for were upon a hypothetical case, and not upon any point legitimately raised during the trial; and ruled that all the proceedings at the trial of this case were in accordance with the course and usage of the common law.

"To which several rulings the defendant, being found guilty excepted."

G. F. Choate, (*E. W. Kimball* with him,) for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

SHAW, C. J. Various exceptions are taken to the decisions of the judge at the trial.

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1. The first is to his instruction that the jury are to be governed by the direction of the court in matters of law. This was right. A majority of the court, upon great deliberation, have decided, either that the jury law of 1855 did not change the law as it previously stood, but was merely declaratory; or, if it could be so construed as to change the law, and make the jury judges of the law, it was unconstitutional and void; and in either case, the direction of the judge was right. *Commonwealth* v. *Anthes*, 5 Gray, 185. *Commonwealth* v. *Martin*, 5 Gray, 303, note.

2. The defendant's counsel further requested the judge to instruct the jury, that the law under which this indictment was found, if it provides for a trial contrary to the course and usage of the common law, is unconstitutional and no verdict is to be found under it.

Upon this point the court declined to give any instruction to the jury, on the ground that the instructions prayed for were upon a hypothetical case and not upon any point legitimately raised in the case during the trial, and that the proceedings were according to the course of the common law.

We think this right. The case supposed was purely an abstract question, not raised by any facts, or any evidence tending to prove facts, admitted or rejected, and therefore the judge was not legally called upon to give any direction or opinion upon it.

The prosecution against the defendant was for being a common seller. This law and this mode of trial have long been in use, and are according to the course of the common law.

It is not necessary to consider whether other parts of the statute known as the liquor law are or are not constitutional; if part of a statute is good, it will be carried into effect, though other parts, not connected with it, are unconstitutional. *Fisher* v. *McGirr*, 1 Gray, 21. *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 99. *Exceptions overruled.*

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Commonwealth *vs.* John Farrar.

Upon the trial of an indictment for unlawful sales of intoxicating liquors, two witnesses testified that they drank such liquors together at the defendant's shop and other places; one of them testified that his object was to inform against the sellers; but both testified that the other did not know of this object, and he testified that his only object was to gratify his appetite. He was asked on cross-examination whether on leaving one of these places the other witness did not whistle for him, and answered in the negative. *Held*, that this answer was immaterial, and could not be contradicted.

Indictment on *St.* 1855, *c.* 215, §§ 15, 17, for unlawfully selling intoxicating liquors. Trial and conviction in the court of common pleas before *Bishop*, J., who allowed this bill of exceptions:

"The only witnesses called by the government who testified to any sales of intoxicating liquors were David M. Currier and Thomas J. Burns of Methuen. They testified that upon the evenings of the 17th and 20th of January 1857 they purchased and drank at the defendant's house and eight or ten other places intoxicating liquors. Currier testified that he came to Lawrence with Burns to purchase at said places, and for the purpose of informing against the persons keeping the said places; but that Burns did not know of his object, and that neither he nor Burns had ever before the 17th been at either of said places. Burns testified that he came to Lawrence with Currier, but had no suspicion of his object in visiting the places where he either went with or met him; that his own only object in going to the various places was to get liquor to gratify his appetite for the same. Both Currier and Burns testified that they met upon the 17th and 20th aforesaid at all of those places where they got drink by mere accident, and without arrangement or any concert of action.

"Upon the cross-examination Burns was asked if, upon leaving one of the places where they got drink upon these occasions, Currier did not whistle for him. He said, 'No; he did not.' He was then asked if he had not testified upon a former occasion that Currier did so whistle for him. He answered that he

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had not so testified. The counsel for the defendant then offered to prove that Burns had so testified. But the court, deeming it collateral and immaterial to the issue, refused to allow witnesses to be called for the purpose of contradicting Burns upon this subject."

D. Saunders, Jr., for the defendant, cited *Commonwealth* v. *Sacket*, 22 Pick. 394; *Folsom* v. *Brown*, 5 Foster, 114; *Drew* v. *Wood*, 6 Foster. 363; *Newton* v. *Harris*, 2 Selden, 345; *Cameron* v. *Montgomery*, 13 S. & R. 132.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Merrick, J. The evidence offered to disprove the truth of the answer given by Burns, a witness produced in support of the prosecution, to a question put to him on his cross-examination, was excluded solely upon the ground that the fact of which he testified was collateral and irrelevant to the issue to be tried. The rule of law upon which this exclusion was directed is too familiar and well settled to be denied; and the defendant does not attempt or propose to contest it. 1 Greenl. Ev. § 449. His objection is not to the rule, but to the application of it in a case and under circumstances where he contends it ought not to have been applied. His position is, that the fact that Burns was called by the whistle of Currier to some one or more of the several drinking shops which they visited together would, if proved, have had a tendency to show that there was a previously arranged scheme or confederacy between them to induce sundry persons to make sales of spirituous liquors in violation of law, and thus to procure the means wherewith to convict them of a criminal offence; that such a confederacy must necessarily have created a bias and prejudice in their minds against the parties who were the objects of their conspiracy; and that such feelings, or state of feeling, may always be shown, to impeach a witness and disparage his credibility.

But without stopping to determine the question of law involved in this general proposition, or even at all to consider it, since it seems wholly unnecessary to do so, we think it very clear that the position taken by the defendant cannot be maintained. Currier undoubtedly went to Lawrence to purchase

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liquor at various places for the purpose of informing against the keepers of them. That he openly and distinctly avows. But he testified that he did not make known this purpose to Burns; and the latter declared that he was entirely ignorant of it. His object, according to his own testimony, was to get the liquor merely to gratify his appetite and desire to drink it. The fact that he was invited by a companion, either in express terms or by token which was equally intelligible, to accompany him to places where intoxicating liquor could be procured, is certainly not less consistent with the supposition that in giving his attention to it he was seeking renewed opportunities of indulgence, than with the hypothesis that he was an accomplice in a conspiracy to procure the commission of a crime for the sake of prosecuting the offender. The witness may have had the one or the other of these objects in view; he may have been influenced in his conduct by motives which either of them would have excited. But which of them exerted this influence, the fact that he first received an invitation, or listened to some sound which he understood to be its equivalent, before he went to the place of sale, has no tendency to elucidate or disclose. It is not inconsistent with either hypothesis. It was therefore immaterial and worthless as a means of proof, and was properly rejected as collateral and irrelevant to the issue, because it could afford no aid to the jury in reference to the question upon which they were to pass. Whenever the evidence of circumstances leaves it indifferent which of several hypotheses is true, it never can amount to proof, however great the probability in relation to one of them may be; and it can therefore scarcely fail to be the occasion of injustice if it is not in practice entirely disregarded. 1 Stark. Ev. (1st Amer. ed.) 506. *Exceptions overruled.*

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Commonwealth *vs.* Charles W. Buxton.

On the trial of an indictment on St. 1855, c. 405, for keeping a building used in the manner declared by that statute to be a common nuisance, no proof is required of the allegation in the indictment of the building's "being a common nuisance to the great injury and common nuisance of all the peaceable citizens."

Indictment on St. 1855, c. 405, for keeping and maintaining at Salem, during a certain time, "a certain building, to wit, a shop then and there resorted to for illegal gaming, and then and there used by the said Buxton for the illegal sale and keeping of intoxicating liquors; said building so used as aforesaid being then and there a common nuisance, to the great injury and common nuisance of all the peaceable citizens of said commonwealth there residing and inhabiting, passing and repassing; against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

At the trial in the court of common pleas, the defendant contended that the jury would not be warranted in convicting him upon mere proof of his keeping and maintaining this shop and using it for the illegal sale and keeping of intoxicating liquors, without its being proved, as alleged, to have been to the great injury and common nuisance, &c. But *Perkins*, J. refused so to rule, and the defendant, being convicted, alleged exceptions.

W. D. Northend, (*E. W. Kimball* with him,) for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Dewey, J. The concluding allegation of this indictment, "to the great injury and common nuisance of all the citizens," &c., is in accordance with the well established forms of indictments for a nuisance at common law. Upon the trial of such indictment, it must be established that the acts complained of show a case of public nuisance. Cases may arise as to alleged public nuisances where it may be proper to submit to the jury, under proper instructions from the court, the question whether the acts proved show anything more than a private injury. But in most cases, the evidence necessary to prove the alleged

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acts of the defendant would fully discharge all the duty devolving upon the Commonwealth, in maintaining that the same were "to the injury and common nuisance of all the citizens," &c. This would be so especially in indictments at common law for keeping a common gaming house or a house of ill fame, inasmuch as the very acts alleged, if proved, would *per se* prove a case of common nuisance.

It is unnecessary however, in deciding the present case, to go more fully into the consideration of the question how far, in indictments at common law, the government must prove affirmatively that the acts complained of affect large numbers of people and are a common nuisance, in distinction from an injury to a few individuals. This indictment is upon the express provisions of a statute of this commonwealth. *St.* 1855, *c.* 405. The statute itself declares, that all buildings used for the purposes for which this building is alleged to have been kept and maintained shall be common nuisances, and be regarded and treated as such. It further enacts that every person, keeping or maintaining such common nuisance, shall be punished; thus fixing the character of those acts set forth in this indictment and declaring that the party doing the same is guilty of a common nuisance. The result is therefore, that if the facts alleged of the keeping and maintaining of the building for the purposes named in the statute are proved, the fact of the defendant's keeping and maintaining a common nuisance is also proved, which is all that is requisite to show to sustain the concluding averment, "to the great injury and common nuisance of all the citizens," &c.

There is therefore no ground for any exceptions upon this point to the ruling of the court of common pleas.

Exceptions overruled.

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Commonwealth *vs.* Francis Lang, Jr.

Upon an indictment for a felonious assault by shooting with a pistol with intent to murder, the jury returned a verdict of "guilty of the assault and battery as charged, but without the felonious intent." *Held*, that this verdict might be amended by the court during the same sitting by striking out the words "and battery;" and, thus amended, was sufficient.

Under the Rev. Sts. *c.* 137, § 11, a person indicted for an assault with intent to murder may be convicted and sentenced for an assault without felonious intent.

The eleventh section of the Rev. Sts. *c.* 137, providing that any person indicted for a felony, and acquitted of part of the offence charged, and convicted of the residue, may be adjudged guilty of the offence, if any, substantially charged in the residue of the indictment, is not unconstitutional as conflicting with the twelfth article of the Declaration of Rights.

Indictment on the Rev. Sts. *c.* 125, § 11, averring that the defendant at a certain time and place made an assault upon Simeon McQuestion, and "a certain pistol, then and there loaded with gunpowder and a leaden ball, which pistol he the said Lang then and there in his right hand had and held, at and against the said Simeon McQuestion then and there feloniously, unlawfully and maliciously did discharge and shoot, with intent in so doing him the said McQuestion then and there and thereby feloniously, wilfully and of his malice aforethought to kill and murder; and by so doing and by force of the statute in such case made and provided the said Lang is deemed a felonious assaulter." "And so," (the indictment concluded,) the defendant, at the time and place aforesaid, "with force and arms, feloniously assaulted the said Simeon McQuestion in manner and form aforesaid; against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

Trial in the court of common pleas, before *Perkins*, J., who signed this bill of exceptions: "The jury returned a verdict, which was received by the court and recorded by the clerk on the back of the indictment in the following words: 'Guilty of the assault and battery as charged, but without the felonious intent.' But the indictment charging no battery, and the jury having found nothing in reference to a battery, that part, to wit,

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the words 'and battery,' was during the sitting of the court stricken out of the entry on the back of the indictment, as inadvertently entered by the clerk, so that the entry as corrected is, 'Guilty of the assault as charged, but without the felonious intent.' The jury were then discharged from further consideration of the case. Immediately after the following entry was made upon the court docket: 'Guilty, but without any felonious intent.'

"Afterwards the defendants moved that judgment be arrested, because

"First, he has not been convicted of any offence by the verdict of a jury, accepted and recorded by the court.

"Secondly, he has not been convicted of any offence in any other mode authorized by law.

"Thirdly, he has been acquitted of the offence charged in the indictment by the verdict of a jury accepted and recorded by the court.

"Fourthly, the indictment is in other respects informal and defective.

"But the court overruled the motion. To which opinion, direction and judgment of the court the defendant excepts."

S. H. Phillips, for the defendant. The defendant has not been convicted of the offence for which he was indicted, either by confession of his guilt in open court, by admitting the truth of the charge against him by plea or demurrer, or by the verdict of a jury, accepted and recorded by the court; and no sentence can therefore be passed upon him. Rev. Sts. *c.* 123, § 3. Declaration of Rights, art. 12. He has not been convicted of the offence charged in the indictment. *Rex* v. *Holt*, 7 Car. & P. 518. *Regina* v. *Ryan*, 2 M. & Rob. 213. Archb. Crim. Pl. (10th ed.) 439. 1 Russell on Crimes, (7th ed.) 741, 742. The verdict returned was a special verdict. *Dyer* v. *Commonwealth*, 23 Pick. 402. *Commonwealth* v. *Call*, 21 Pick. 509. A verdict in a criminal case cannot be amended.

The Commonwealth has relied on the Rev. Sts. *c.* 137, § 11, providing that "whenever any person indicted for felony shall on trial be acquitted by verdict of part of the offence charged

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in the indictment, and convicted of the residue thereof, such verdict may be received and recorded by the court; and thereupon the person indicted shall be adjudged guilty of the offence, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly." But it is submitted that that statute is unconstitutional, as conflicting with art. 12 of the Declaration of Rights, which declares that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him." See also 1 Chit. Crim. Law, 644; Bac. Ab. Verdict, D; *Commonwealth* v. *Call*, 21 Pick. 513; *Regina* v. *Bird*, 5 Cox C. C 20.

It results, therefore, that the verdict in question is a substantial acquittal. Rev. Sts. *c.* 123, § 4.

J. H. Clifford, (Attorney General,) for the Commonwealth.

THOMAS, J. 1. The indictment charges an assault with intent to murder. It is plain that the jury intended to find the defendant guilty of the assault without the felonious intent. In the entry of the verdict by the clerk, the words "and battery" were inadvertently included; the jury, as the report shows, "having found nothing as to a battery." The entry was amended during the sitting of the court, to conform to the truth. That the entry was rightly corrected we have no doubt. *Commonwealth* v. *Stebbins*, 8 Gray, 492. *Regina* v. *Vodden*, 1 Dearsly, 229, and 6 Cox C. C. 226.

2. The verdict as corrected is a good general verdict, with a qualification negativing the felonious intent. *The King* v. *Williams*, 2 Campb. 646. *Commonwealth* v. *Dyer*, 23 Pick. 404.

If, as suggested by the learned counsel for the prisoner, the verdict is to be deemed a special one, it is nevertheless the corrected entry that is the evidence of such verdict. The entry as amended shows a sufficient verdict.

3. The defendant was convicted of a simple assault. He was charged with an assault with an intent to murder. The jury have found him guilty of the assault, but have negatived the felonious intent. It is objected that the defendant was not convicted of the offence charged in the indictment. He was

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convicted of an assault included in the charge on the face of the indictment, and which constituted part of the transaction prosecuted as felony. The case seems to us to fall clearly within the provision of the Rev. Sts. *c.* 137, § 11. *Commonwealth* v. *Fischblatt*, 4 Met. 354. *Commonwealth* v. *Drum*, 19 Pick. 479. *Commonwealth* v. *Goodhue*, 2 Met. 193. 2 Bennett & Heard's Lead. Crim. Cas. 457.

4. To the suggestion that the provision of the revised statutes is unconstitutional as in conflict with art. 12 of the Bill of Rights, the answer is that the offence is "fully and plainly, substantially and formally" described; that the whole may include a distinct part, and the greater the less.

Exceptions overruled.

JOHN HODGES & others *vs.* DAVID PINGREE.

Before the *St.* of 1854, *c.* 74, a bill in equity could not be maintained by one tenant in common against another for a partition of a wharf and appurtenant rights, and for an account of the profits received by the defendant while in possession of the estate; but might for an account, on striking out the prayer for a partition.

BILL IN EQUITY, filed before the passage of *St.* 1854, *c.* 74, by the executor and devisees named in the will of Gamaliel Hodges, alleging their seisin of an undivided part of a wharf lot, with rights of wharfage and dockage, and Pingree's seisin of the remaining part; Pingree's use of the wharf for the purpose of laying at it vessels of his own and under his charge, and landing merchandise thereon, and depositing thereon materials and rigging for his vessels; his receipt of all the rents and profits of the wharf; his promise to Gamaliel Hodges to account for all business done at the wharf, and to take charge thereof for all interested therein; and his insolvency and refusal to render any account. The bill prayed for a discovery, an account, a commission to make partition of the premises, and for general relief. The defendant demurred generally.

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N. W. Hazen, for the defendant.

S. H. Phillips, for the plaintiffs, cited Rev. Sts. *c.* 81, § 8; *c.* 103, §§ 25, 26; 1 Story on Eq. §§ 67, 71, 80, 441, 466, 518, 655, 656; *Fanning* v. *Chadwick*, 3 Pick. 420; *Goodrich* v. *Staples*, 2 Cush. 258; *Armstrong* v. *Gilchrist*, 2 Johns. Cas. 431; *Russell* v. *Clark*, 7 Cranch, 69; *May* v. *Parker*, 12 Pick. 34, *Adam* v. *Briggs Iron Co.* 7 Cush. 361; *De Witt* v. *Harvey*, 4 Gray, 486; *Clapp* v. *Shephard*, 23 Pick. 228; *St.* 1854, *c.* 74.

Shaw, C. J. This is a suit by one tenant in common against his cotenant, with two objects; one to obtain partition of real estate; and the other to have an account of the profits received by the defendant during his past occupation of the premises. These two subjects are entirely distinct.

With regard to the partition, there is a complete and adequate remedy at common law; and if by reason of the rights of wharfage and dockage, the premises cannot be divided without damage to the owners, the whole estate may be set off to any one of the parties who will accept it, he paying such sums of money, by way of owelty, as may be awarded by the commissioners. Rev. Sts. *c.* 103, § 25. *St.* 1850, *c.* 239.

The partition being apparently the leading object of the bill, the demurrer is well taken. It is said that the court, having once acquired jurisdiction of the case, will retain the case, to do complete justice between the parties. That is true, so far as concerns matters incidental to the subject of which the court has jurisdiction, and which must be disposed of in order to enable the court to enter a decree in the matter of which it has jurisdiction. *Holland* v. *Cruft*, 20 Pick. 321. But here the suit for an account does not draw after it, or make it necessary to consider, the question whether partition shall be had. The two things are incompatible. So far, therefore, the demurrer must be sustained.

But we are of opinion that the bill, if amended by striking out all relating to a partition, might be maintained as a bill in equity for an account. *Plaintiffs have leave to amend.*

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STEPHEN G. WHEATLAND *vs.* JOHN A. LOVERING.

The *St.* of 1855, *c.* 194, by which this court "shall have jurisdiction in equity in all cases of fraud," confers no jurisdiction over suits commenced after its passage, and before it took effect.

ACTION OF TORT, under *St.* 1853, *c.* 371, praying for relief in equity, brought by the assignee of an insolvent debtor to set aside a conveyance obtained from said debtor by false representations and in fraud of his creditors. Writ dated and served April 17th 1855. The defendant on the 7th of November 1855 filed a general demurrer.

S. C. Bancroft, for the defendant.

S. H. Phillips, for the plaintiff.

DEWEY, J. This demurrer must be sustained, this court having at the time of the institution of the present action no general jurisdiction over frauds, that would authorize giving the relief in equity here prayed for. *Holland* v. *Cruft*, 20 Pick. 321. Nor can this action be maintained under the provisions of the *St.* of 1853, *c.* 371.

The only ground upon which the plaintiff has supposed his action might be maintained we understand to be that the recent *St.* of 1855, *c.* 194, has given to this court "jurisdiction in equity in all cases of fraud." This provision is certainly broad enough to include cases of fraud which had not been before embraced in the jurisdiction conferred on this court as a court of equity. But this statute did not take effect until the 14th of May 1855, twenty seven days after both the date and the service of the writ in the present case. Ordinarily the time of making the writ is to be taken as the time of the institution of the suit.

Although the principle has not been departed from, yet it has been held under peculiar circumstances, as in a writ of replevin where the writ was actually made before the property was demanded, but it was shown that the writ was placed in the hands of the officer with directions to make such demand before making a service, that the action should be considered as com-

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menced after the demand was made. *Badger* v. *Phinney*, 15 Mass. 364. Also where a writ against the indorser of a note was delivered to an officer, with instructions not to serve it until after he had given the indorser notice of the non-payment of the note by the maker, and the writ was not in fact served until such notice was given, it was held that the action was not commenced until the service of the writ. *Seaver* v. *Lincoln*, 21 Pick. 267. Neither of these cases gives any countenance to the idea that, under any circumstances, the writ can be considered as made at a later period than that of the actual service of the process. The case of *Swift* v. *Crocker*, 21 Pick. 242, seems to be directly to the point that when the service has been made, either wholly or in part, the suit must be deemed to have been commenced, and it cannot embrace any cause of action accruing subsequently to the service.

We must therefore hold that the present action was commenced on the 14th of April, that being the day of the date of the writ, and also the day when service was made thereon. But upon that day this court had no jurisdiction of the case, and no such action could properly be instituted. The *St.* of 1855, *c.* 194, authorized subsequent actions, but gave no vitality to those commenced before the statute took effect. ***Demurrer sustained.***

NATHANIEL WELLS *vs.* JOHN HEATH.
JOHN PRINCE *vs.* SAME.

A testator devised his farm to the selectmen of a town "and their successors in office forever," in trust "yearly and every year to appropriate and pay all the rents, incomes and profits of the said farm for the support of a gospel minister or ministers in said town, of the Congregational denomination; the said selectmen to be always accountable to said town, and to render to said town annually, and as much oftener as said town may require, a true and faithful account of all their proceedings relative to said farm;" "subject however to these directions and restrictions:" that in case of strip or waste, or of misappropriating any part of the income, or of the selectmen's refusal or neglect to render an account to the town, then the two oldest persons in the nearest degree of kindred to the testator within the county might proceed to settle the matter by submission to arbi-

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tration, and, if the selectmen should neglect for six months to pay to said kindred any sum awarded, "the said two of my said kindred shall forthwith take possession of my said farm; and the said farm shall descend thenceforward to them, in equal shares, to have and to hold the same to them and their heirs and assigns forever; and the term of said selectmen and of said town in said farm shall thenceforward and forever cease and expire." At the time of the execution of the will there was but one religious society in the town. *Held*, that this devise was not for the benefit of the Congregational minister or ministers in the town, but for the benefit of the inhabitants of the town in their parochial capacity, and, upon their subsequent legal organization as a separate corporation, in trust for the parish; that the selectmen took an estate in fee, and not a life estate upon condition; that the executory devise to the testator's next of kin was void as tending to create a perpetuity; that the legislature might provide by law for the election of new trustees by the parish; and that a sale by such trustees, under license granted by this court, pursuant to *St.* 1846, *c.* 244, passed a good title as against all parties.

WRITS OF ENTRY to recover parts of a farm in Topsfield, of which Daniel Bixby died seised in 1825. The first demandant was an heir at law of said Daniel; and the second, an heir at law of Ruth Bixby, his widow and residuary legatee. By his will, made in 1811, he devised the farm in question to his said widow for life, and, after her, to his nephew Daniel Towne for life, and then as follows:

"I give and devise to the selectmen of the town of Topsfield aforesaid, and their successors in office forever, all my farm, situate in Topsfield aforesaid and in Boxford in said county, after payment of the debts, charges and legacies hereinbefore mentioned, and after the terms of my said wife and nephew therein, as hereinbefore expressed, shall have fully expired and run out; to have and to hold the same to the said selectmen and their successors, on the special trust and confidence here following, that is to say: that the said selectmen and their successors shall from time to time lease out the said farm for a term not more than seven years, nor less than three years, extraordinaries excepted; and shall yearly and every year appropriate and pay all the rents, incomes and profits of the said farm for the support of a gospel minister or ministers in said town of Topsfield, of the Congregational denomination; the said selectmen to be always accountable to said town of Topsfield, and to render to said town annually, and as much oftener as said town may require, a true and faithful account of all their proceedings relative to said farm; the said farm to be called and known by the name of the

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Donation Farm for the support of the gospel; subject however to the directions and restrictions hereinafter mentioned."

"My will is, and I hereby further order and direct, that, after the said selectmen shall come into possession of my said farm, as hereinbefore provided, they shall be allowed to cut not exceeding six cords of wood in any one year; and it shall be the duty of those who may be in the nearest degree of kindred to me to see that the said selectmen at all times cause the buildings and fences on said farm to be kept in good repair, and that said farm be well managed for the purpose for which it is given. And if any strip and waste be made of said farm, or any part thereof, while under the care of said selectmen; or if any part of the rents, incomes and profits of said farm shall at any time be appropriated for any other purpose than that for which it is hereby given and intended; or if said selectmen shall refuse or neglect to render to said town of Topsfield a true and faithful account of their proceedings in the premises as hereinbefore required; then the two oldest persons in the nearest degree of kindred to me, living within the present limits of the said county of Essex, shall give notice to said selectmen; and after six months, if they still see cause, shall proceed to settle the matter in manner following: The said two of my kindred shall appoint one disinterested judicious freeholder, and the said selectmen shall appoint a second; and they two shall decide, or, in case of disagreement, they shall together appoint a third to join them; and the decision of the two persons so appointed, or of the three persons so appointed, or a majority of them, as to the damage sustained by such strip and waste, or bad management, shall be final; and the said selectmen shall pay to said two of my kindred such sum as the referees shall decide, within six months after such decision; or, on failure of such payment within that time, the said two of my said kindred shall forthwith take possession of my said farm; and the said farm shall descend thenceforward to them, the said two of my kindred in the nearest degree and living within the limits aforesaid, in equal shares; to have and to hold the same to them and their heirs and assigns forever; and the term of said selectmen and of said town in

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said farm shall thenceforward and forever cease and expire. And if the said selectmen shall, for thirty days after due notice of the appointment of the first person by said two of my kindred as herein provided, refuse or neglect to appoint the second, as herein provided, the said two of my kindred may make known such refusal or neglect to the judge of probate for the time being for said county of Essex; and three disinterested judicious freeholders, appointed by said judge, shall in the same manner decide, and their decision shall be equally and in the same manner binding, as if the referees had been appointed in manner before provided."

Ruth Bixby entered on the premises after the testator's death, and occupied them until her own death in 1834; then Daniel Towne, the testator's nephew, entered and occupied till his decease in 1845, after which the selectmen of Topsfield entered, and in 1846 were appointed by the judge of probate trustees of the estate under the will, and leased it for seven years.

In 1800 and previously the inhabitants of the town of Topsfield acted as a parish, raising money for the support of a minister of the gospel, and instructors in piety, religion and morality, and (excepting those who legally separated themselves and joined other parishes or religious societies) continued to exercise all the functions of such a corporation until the 29th of March 1824, when the parties remaining connected with such parish were duly organized under *St.* 1823, *c.* 117, which enacted that "all the inhabitants of the town of Topsfield, with all the lands in said town, (except such inhabitants and such lands as do belong to some other parish or religious society, or are exempt by law from parish charges in said town of Topsfield,) be and they hereby are incorporated into a parish, by the name of the Congregational Parish in Topsfield, subject to all the duties and vested with all the rights and privileges to which parishes are by law entitled;" "and the said congregational parish shall be deemed and taken to be successors to the said town of Topsfield, as far as related to parochial proceedings, rights and privileges, and subject to all contracts of a parochial nature which may have been made by said town."

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The new corporation retained the former minister, without any new installation, continued him in the occupation of the parsonage lands, and retained and used the church plate. The ecclesiastical affairs of the parish, both before and since this incorporation, have always been conducted according to the Congregational system of church government, and Orthodox or Calvinistic tenets have always been professed by the members. The testator was always a deacon in the old parish, and, so long as physically able, attended public worship at their meeting house. None of the ministers of the town living at the time of his death were living when these actions were commenced. The net income of the farm since Daniel Towne's death has been appropriated to the support of the minister of the Congregational Parish.

In 1847 that parish duly accepted the St. of 1847, c. 231, which provided for an election by them of trustees, "members of said parish, who, with their successors, shall thereafter be constituted a body corporate, by the name of the Trustees of the Bixby Donation Farm, for the support of a gospel minister or ministers in the town of Topsfield, of the Congregational denomination;" and "have the power to take and hold, and shall take and hold, all that farm and estate devised to the selectmen of the town of Topsfield by Daniel Bixby, subject to all the restrictions and trusts mentioned in said will; shall apply the incomes and profits thereof according to the directions in said will; and shall hold and administer said estate in all respects according to the terms, provisions and directions of said will, except that said trustees shall not be accountable to the said town, and shall not be required to make any reports of their doings to said town; but shall be accountable to said parish, and make all such reports to said parish annually or oftener, as by the terms of said will were required to be made to said town;" and "in all other particulars said trustees shall take the place of said selectmen, and shall perform and discharge all the duties and be subject to all the liabilities of the said selectmen, as provided for in and by said will."

Trustees were duly elected under this statute by the parish, and

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appointed by the judge of probate, and accepted the trust and entered upon the premises, and in 1853 demised them for a term of three years, by a lease which provided that the lessee might cut not exceeding nine cords of pine wood from the farm yearly; and the lessee did cut nine cords of hard and soft wood yearly.

At November term 1855 of this court said trustees, upon their petition pursuant to a vote of the parish, were authorized to sell and convey the estate, and to invest the proceeds subject to the same trusts and uses as the original trust; and in May 1856 sold the estate and conveyed it by warranty deed to the tenant in these actions.

If on the foregoing facts the demandant in either action was entitled to recover, the tenant was to be defaulted. If the demandant in neither action was entitled to recover, judgment was to be for the tenant, unless it was competent for the demandants to show that from 1812 to 1830 there was another Congregational society in Topsfield beside the old town society; that from 1833 to 1836 there was another similar Congregational society; that the farm had not been managed according to the rules of good husbandry; that after the death of Daniel Towne the selectmen had allowed the farm to be held by a tenant at will for no fixed rent; and that the annual reports of the trustees had been made to the parish, and not to the town; in which event the case was to stand for trial.

T. P. Pingree, Jr., for the demandants.

S. H. Phillips, (*W. G. Choate* with him,) for the tenant.

Merrick, J. The premises demanded in these suits constitute the farm formerly owned by Daniel Bixby. By his will he devised the same, subject to the life estates of his wife and nephew, and also to certain specified directions and restrictions, to the selectmen of the town of Topsfield, on the special trust and confidence that they should yearly and every year appropriate and pay all the rents, income and profits of the farm for the support of a gospel minister or ministers in that town of the Congregational denomination. The demandant Wells is one of the heirs at law of the testator, and claims to be entitled in that capacity to maintain this action. He insists that the

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devise to the selectmen of Topsfield was wholly inoperative and void, or that it was a devise to them of a life estate only, or that it was a devise upon certain conditions which have not been kept, and that by the breach thereof the devisees have forfeited their estate, and that the title thereto has consequently become vested in the heirs at law of the testator. The demandant Prince contends that, by force of the residuary clause in the will, the estate was devised to Ruth Bixby, under whom, as one of her heirs at law, he endeavors to establish a title to it in himself.

There is no difficulty in ascertaining from the language and provisions of the will the meaning of the testator, or what was his intent and purpose in the devise to the selectmen of Topsfield. He obviously intended to afford permanent assistance to the inhabitants of that town in the support of a religious teacher of the Congregational denomination. The devise was in substance a gift to them; they were the *cestuis que trust*, and were to enjoy exclusively the benefits and advantages of the estate devised, for whose sole use and advantage it was taken and held by the devisees. It was thus given to the inhabitants of the town, and not to those who for the time being were there the minister or ministers of the gospel. *Emerson* v. *Wiley*, 10 Pick. 317. This is apparent from the provision that the selectmen are always to be accountable to the town for their conduct and proceedings in their management of the farm, and are to render annually to the town, and as much oftener as the town shall require it to be done, a true and faithful account of all matters pertaining to the trust estate. And that it was the intention of the testator that the real and substantial interest in the estate devised should be in the town is apparent also from his express declaration in another part of the will, that as soon as the two persons in the nearest degree of kindred to him should take possession of the estate under the executory devise to them, the term of the town, as well as of the selectmen, should thenceforth and forever cease and expire.

But the devise was to the selectmen to hold the estate devised to them in trust for the town in its parochial capacity.

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At the time of the execution of the will there was but one religious society in the town of Topsfield, and according to the well settled principles of law pertaining to those matters, the town was then obliged to maintain and support public worship and perform all parish duties; and was in all respects in relation to the support and maintenance of public worship to be considered a parish until the formation of a new one within its territorial limits. When the Congregational Parish in Topsfield was organized on the 29th of March 1824 under the *St.* of 1823, *c.* 117, it succeeded to all the parochial property, rights, duties, and liabilities of the town. *Dillingham* v. *Snow*, 5 Mass. 547. *First Parish in Brunswick* v. *Dunning*, 7 Mass. 445. *Austin* v. *Thomas*, 14 Mass. 333. *First Parish in Shrewsbury* v. *Smith*, 14 Pick. 297. *Ludlow* v. *Sikes*, 19 Pick. 317. *Lakin* v. *Ames*, 10 Cush. 198. The trustees thenceforward held the devised estate in trust for the newly incorporated parish.

The devise to the selectmen of the town of Topsfield was a good and sufficient description of the persons who were to take the estate as devisees. It is clear that any words which are sufficient to denote the persons meant by the testator, and to distinguish them from all others, will secure to them the property or estate which may be given them in a will. 6 Cruise Dig. tit. 38, *c.* 10, § 27 *& seq.*

But it is objected by the demandants that if the individuals designated as the selectmen of Topsfield could take the estate devised to them, they took it only for life and not in fee, because there were no words of inheritance annexed to the gift. The devise is, in terms, to the selectmen of the town of Topsfield and their successors in office forever. It is certainly true, as contended by the demandants, that the selectmen of a town do not in any sense constitute a corporation, and that a gift or conveyance, in general terms, to them and their successors in office, whether by deed or devise, does not create an estate in fee, but for life only. But this devise under the will of Bixby to the selectmen of Topsfield was not a gift to them to their own use, but in trust for others. And it is an established rule of law that where an estate is granted to one or more persons in trust, with-

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out words of limitation to heirs and assigns, and the trust is of such a nature that, to support and carry it into effect, a legal estate in the trustee, which will or by possibility may exceed the life or lives of the trustee or trustees, is required, the law will construe the estate to be in fee. *Attorney General* v *Federal Street Meeting-house*, 3 Gray, 48. *Cleaveland* v. *Hallett*, 6 Cush. 406.

Applying this principle to the devise of the farm to the selectmen of Topsfield, when considered in reference to all the provisions in the will concerning it, there can be no doubt but that the estate in fee simple vested in the trustees. All the provisions in the will show that it was the intention of the testator that the devised estate should be permanently appropriated to the sole and exclusive use of the *cestuis que trust*. The farm is given to the selectmen and to their successors in office forever. They are yearly and every year to appropriate and pay over the rents, income and profits of it for the support of a gospel minister; and they are annually, forever, without any limitation of time, to render just and faithful accounts of their proceedings in relation to the estate to a corporation which has perfect existence. And in order to secure to the *cestuis que trust*, who are the objects of his bounty, the uninterrupted and perpetual enjoyment of the estate devised, and of all the income and profit which may be derived from it, the testator endeavors to make certain the fidelity of the trustees by exposing them to prescribed penalties if they should fail to perform their duty according to the directions and instructions particularly specified in his will.

To the same end and for the same purpose also are all its provisions in relation to the executory devise over to the two persons nearest to him in kindred who shall be living in the county of Essex when his directions shall cease to be observed. It is true that this executory devise is wholly ineffectual and inoperative, because the estate will not necessarily come to vest in the executory devisees within the time prescribed as the rule to prevent the creation of perpetuities; for it would be impossible of course to foresee, when the estate was taken by the trustees, within what time any of these contingencies would

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occur, upon the happening of which the executory devise was to take effect. It might not happen until after many generations should have passed away. 6 Cruise Dig. tit. 38, *c.* 13, §§ 20, 21. *Brattle Square Church* v. *Grant*, 3 Gray, 142. But this provision, like everything else contained in the will, evinces clearly the intention of the testator to make the devise in favor of the *cestuis que trust* a perpetual benefit, and shows that an estate which may, and in the contingencies provided for necessarily must, exceed the life or lives of any designated trustee or trustees, is indispensable to carry the trust fully into effect. The devise therefore in the will of Bixby to the selectmen of Topsfield gave to them the estate in fee simple.

It is a mistake to suppose that the estate thus devised was given, as the demandants contend, upon any condition, the nonperformance of which might cause a forfeiture of the estate of the devisee. No such condition was annexed, or attempted to be annexed, to the estate by the testator. A condition, or the benefit of a condition, can be reserved only to the donee, feoffee, devisee or his heirs. 2 Cruise Dig. tit. 13, *c.* 1, § 15. *Hayden* v. *Stoughton*, 5 Pick. 528. The testator, so far from reserving or attempting to reserve the benefit of any condition to himself or to his heirs at law, makes a special and particular provision for the express purpose of preventing the estate from returning to or becoming vested generally in his heirs. That is to say, he prescribes upon the occurrence of certain contingencies that it shall be taken possession of by the two persons nearest in kindred to him who shall then happen to be residents in the county of Essex, and shall thenceforward descend to them and their heirs as absolute owners in equal shares. As it thus appears that the whole estate was devised; that there was no condition annexed to it; that the executory devise over was inoperative and void; and that the full execution of the trust created by the will required an estate exceeding in duration the lives of the trustees named; the conclusion is inevitable, that no forfeiture has been incurred, but that the selectmen of the town of Topsfield took an estate in fee simple in the farm devised to them.

From these considerations it appears that neither of the de-

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mandants ever had or acquired any title whatever to the demanded premises; and it would therefore seem to be quite unnecessary to inquire whether the proceedings under which the tenant claims to be the lawful owner thereof were regular and correct. It is sufficient to defeat these actions, that he is in possession claiming title under a deed of conveyance, and that the demandants show no right to the estate in themselves. But we may add very briefly that we perceive no want of lawful authority in the grantors to make the conveyance. By the *St.* of 1847, *c.* 231, a new mode of appointing trustees is provided for. That mode has been strictly pursued, and it is not suggested that the provisions upon this subject have in any particular been disregarded. In all other respects the statute leaves the rights of the parties in interest just as they existed under the will. After the new trustees were appointed, they, being by virtue of the provisions of the statute the owners in fee of the demanded estate, but in trust under the will of Bixby for the then existing Congregational Parish in Topsfield, did, at the request of that parish and in pursuance of its votes in relation thereto, apply to this court for license to make sale of the real estate, and to hold the proceeds of such sale in lieu thereof and upon the same trust as they held said estate. Due proceedings were had upon that application, and the license prayed for was granted. This was a judicial decree upon a subject within the proper jurisdiction of the court; and therefore it is to be regarded as an adjudication conclusive upon all parties. *St.* 1846, *c.* 242. The trustees, deriving their right under the license thus given them, and acting with the express consent and in conformity to the expressed wish of the *cestuis que trust*, sold and conveyed the estate to the tenant, and he thereby acquired a complete and perfect title to it.

Pursuant to the agreement of the parties, judgment must be entered for the tenant, as it is apparent from the views already taken that the further facts which the demandants offered to prove are immaterial to the issue, and, if established, could not in any degree affect its determination.

Judgment for the tenant.

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Solomon Parks *vs.* City of Newburyport.

The passage of water from rain and melting snow over the surface of land for twenty years gives no right to its continuance.

Action of tort. The declaration alleged that there ever had been a passage for water over the land of the defendants, which the plaintiff had a right to have open, and that the defendants within one year of the date of the writ had obstructed said passage way so as to turn the water upon the plaintiff's land, by reason whereof the plaintiff's well was destroyed.

At the trial in the court of common pleas, it appeared that the plaintiff's land and the defendants' land adjoined each other and were situated on the southwest side of Purchase Street in Newburyport; that the defendants' land was not fenced towards the street, and had been for an indefinite number of years used as a school yard, in which were two school-houses; that the two lots were on about the same level, and for most of the year were dry and free from water; that the land surrounding them was generally level, but ascending gradually to the southwest; and that in periods of heavy rain, and in the spring of the year, when the snow and ice were broken up, the water from the higher lands in the rear passed off toward the Merrimac River over the defendants' land. The defendants two years ago built an engine-house on their lot, and made an embankment around it.

The plaintiff contended, that by reason of filling in the dirt around the engine-house the water which collected in the spring was not allowed to flow off into the street, but was turned upon the plaintiff's land, and did the injury complained of. The defendants contended that the plaintiff had proved no cause of action. But *Morris*, J. instructed the jury, "that if, for a period of twenty years prior to the act complained of, the water accumulating on the land in the rear of the lots in question had been accustomed to find its outlet over the land of the defendants, and the same had been obstructed by the acts of the defendants

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in such a way as to turn it from their own land across the plaintiff's, and occasion a substantial injury to the property of the plaintiff without any fault or want of care on his part, then the defendants would be liable." The jury found a verdict for the plaintiff, and the defendants alleged exceptions.

E. F. Stone, for the defendants.

O. P. Lord, for the plaintiff.

By the Court. The declaration is for obstructing a watercourse, and the instruction allowed the jury to find for the plaintiff, though there was no watercourse. No action will lie for the interruption of mere surface drainage. *Luther* v. *Winnisimmet Co.* 9 Cush. 171. *Ashley* v. *Wolcott*, 11 Cush. 192.

Exceptions sustained.

Seth Dewing *vs.* Adolphus Durant.

After a levy of an execution upon an equity of redemption in real estate by sale in a manner not authorized by law, the judgment creditor may obtain a new execution by *scire facias*, under Rev. Sts. c. 73, § 21.

Scire facias, sued out on the 21st of December 1855, to revive a judgment obtained by the plaintiff, and Joseph Foster, since deceased, against the defendant, and to obtain an alias execution thereon. The parties submitted the case to the judgment of the court upon the following facts:

One execution, issued upon the judgment, was levied upon land the title to which stood upon the records in the name of the defendant's wife and of George Cutter, and which was then under mortgage; and the right in equity of redeeming the land from that mortgage was sold by auction on the execution, and purchased by Foster, who within a year thereafter brought a writ of entry against Adolphus Durant, his wife and George Cutter, to recover the land, upon the ground that the conveyances of land to Mrs. Durant and to Cutter were fraudulent

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and void as against Durant's creditors, having been made with the design and for the purpose of fraudulently securing it from attachment, and for the purpose of delaying and defrauding his creditors, and that the demandant was therefore entitled to recover the land, under the provisions of St. 1844, c. 107. But this court, as appears by the report of *Foster* v. *Durant*, 2 Gray, 538, held that the demandant could not recover, because the execution had been levied by sale of the equity, and not by appraisement and setting off on execution; and on the 20th of June 1855 entered judgment for the tenants.

J. W. Perry, for the plaintiff.

N. W. Harmon, for the defendant. The plaintiff cannot maintain this suit. 1st. Because from the facts agreed it appears that the execution has been paid in full to the judgment creditors, and they could not, after the sale on execution, be interested as such judgment creditors in the amount which one of them might realize, as purchaser, out of his purchase. 2d. Because § 21 of c. 73 of the Rev. Sts. giving the judgment creditor this remedy of *scire facias*, "if, after the execution is returned or recorded, it shall appear that the estate levied upon was not the property of the debtor, or not liable to be seized on the execution, or that it cannot be held thereby," does not apply to a levy by seizure and sale of an equity of redemption, but only to a taking and setting off by metes and bounds. And there is no decision contrary to this position; for in *Perry* v. *Perry*, 2 Gray, 326, the only point decided was that an action of contract would not lie on the judgment, when the previous levy was utterly void.

Metcalf, J. The court cannot perceive any distinction, which will avail the defendant, between this case and that of *Perry* v. *Perry*, 2 Gray, 326. If there is any distinction between the two cases, the present case is the strongest for the plaintiff For, as was decided in *Foster* v. *Durant*, 2 Gray, 538, the proceedings under the original execution were utterly void. There was, in law, no levy at all on the equity of redemption which the officer undertook to sell and convey to Foster. Whereas, in *Perry* v. *Perry*, the mode of levy was right, and the execution

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would have been actually satisfied, if the equity of redemption which was levied on and sold, had belonged to the execution debtor.

It is contended for the defendant, that the only adjudged point, in *Perry* v. *Perry*, was, that an action of contract on the judgment would not lie in such a case; and that the question, whether *scire facias* could be maintained, is still open. But the court there decided, (after an argument, which was the same, in substance, as that which has now been presented to us,) that debt would not lie on the judgment, *for the reason* that no common law remedy, in the case, existed in this commonwealth, nor any statute remedy besides that given by the Rev. Sts. *c.* 73, which was the remedy by *scire facias*. And we see no reason for changing the opinion then formed and announced.

Alias execution awarded.

WILLIAM JEWETT *vs.* JAMES JEWETT.

Under *St.* 1840, *c.* 97, providing that a sale of real estate by an executor or administrator under a license shall be valid as against any person claiming under the deceased, though the deed is not delivered within a year, if certain conditions are complied with and the price "duly accounted for," such accounting must be shown by the probate records.

A remainderman, during the continuance of the life estate, is under "legal disability" within the meaning of *St.* 1817, *c.* 190, § 12, so that he may bring an action within five years after the termination of the life estate to recover land sold and conveyed by an executor under a license, more than five years before the commencement of the action.

WRIT OF ENTRY, dated October 20th 1855, to recover a lot of land in Georgetown. The case was submitted to the decision of the court on the following statement of facts:

Miriam Jewett died seised of the demanded premises in July 1826, and devised them to her son Samuel Jewett for life, "and, after his decease, to be equally divided among his children or their legal representatives." Samuel Jewett died in June 1849,

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leaving the demandant, and one other surviving child, who died without issue in August 1850, aged nineteen years, and whose portion the demandant inherited.

The executor of Miriam Jewett's will, upon petition to the judge of probate, on the 7th of November 1826 obtained a license in due form to sell the premises within one year, to pay debts and legacies; and, after giving bond and notice as required by law, sold the same by auction in December 1826 to a *bona fide* purchaser, who actually paid the price; and in June 1825 executed and delivered a deed in due form to said purchaser, who was the tenant's grantor. The executor never rendered any account of his administration to the probate court, nor do the records of that court show any proceedings relative to said estate subsequently to November 1826. The tenant offers to show, if admissible, that all the legatees and creditors of the testatrix now living, mentioned in the schedule filed by said executor in the probate court, have been paid their respective claims. The tenant and his grantor have been in peaceable and uninterrupted possession of the demanded premises from the time of the sale to the date of the writ.

J. P. Jones, for the demandant.

J. A. Gillis, for the tenant.

METCALF, J. 1. By the law which was in force when the sale was made of these demanded premises, the license for the sale continued in force only one year from the time of granting it. *St.* 1817, *c.* 190, § 12, reënacted by Rev. Sts. *c.* 71. And unless the deed to the purchaser at the sale was executed and delivered within the year, he acquired no title to the land. *Macy* v. *Raymond*, 9 Pick. 285. The grantor of the present tenant therefore acquired no valid title to these premises, and could convey none to the tenant, by the mere legal effect of the license, sale and deed. And the demandant is entitled to recover, if he has seasonably commenced this suit, unless the tenant can hold the premises by virtue of the provisions of *St.* 1840, *c.* 97, which are these: "Whenever the validity of any sale of real estate, which has been or may be made by any guardian, executor or administrator, is drawn in question by any person claiming

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under the ward or deceased, if the license, bond, oath and notice have been according to law, and the price for which the land shall have been bid off at auction has been paid by a *bona fide* purchaser, and duly accounted for, such sale shall be deemed valid, although the deed may not have been executed and delivered within the year from the granting of the license."

The only question that is now raised under this statute is, whether the tenant must show that the money received by the executor, on the sale of these premises, was accounted for by him in the probate court; or whether he may show, by parol evidence, that he paid that money in discharge of claims made upon his testator's estate. And a majority of the court are of opinion that the words "duly accounted for" mean accounted for according to the law for the settlement of executors' accounts of their administration; and that this must be shown by the tenant, as he must show that the license, bond, oath and notice were according to law. Those four things must be shown by the probate records or files. And so, we think, must be the executor's accounting for the price of real estate sold by him on license. We understand the effect of St. 1840, c. 97, to be this, namely, that the omission to execute and deliver a deed within a year after the granting of the license shall not render the sale invalid, if the proceedings have, in all other particulars, been conformed to the law. We cannot suppose that when it requires that the price should be duly accounted for, the legislature thereby meant that it might be accounted for in any other way than is prescribed, by other statutes, for the rendering and settlement of administration accounts, to wit, by presentment to the judge of probate, who is to give notice to all persons interested that they may appear and contest them, and who is to pass a decree allowing or disallowing them in whole or in part, subject to an appeal from his decree to the supreme court of probate. It is the policy of our law that the administration and disposition of the estates of deceased persons shall be open and public, before a judicial officer, and be found in public offices established for the preservation therein of all the authorized pro-

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ceedings of such administration and disposition, either in the records or on the files in those offices. If the executor in this case had presented to the judge of probate, for allowance, an account of the matter which he now offers by way of duly accounting for the proceeds of the sale of these premises, we cannot know that it would not have been contested and disallowed.

We are not to be understood to decide that the price paid for land sold on an executor's license must necessarily be accounted for in the probate office before an action is brought by those who claim under the testator. They might bring an action before the price could be thus accounted for; in which case the tenant might doubtless show, in defence, that it was thus accounted for after action brought. How long after a sale this might be done, we need not now determine. It is sufficient for the decision of this case that the sale was made more than thirty years ago, and that there was no due accounting before this action was commenced, and has been none since.

2. The other question in the case is, whether this action was seasonably brought. And this depends on the provision in *St.* 1817, *c.* 190, § 12, that "no action by any heir or other person interested, for the recovery of any real estate sold under such license, shall be sustained, unless such action shall be brought within the term of five years after the execution and delivery of the deed given under such license: Provided always, that minors, and other persons under legal disabilities, may maintain such action at any time within the term of five years from the removal of their disabilities." See also Rev. Sts. *c.* 71, § 37. The court are all of opinion that the demandant is within this proviso or exception. The testator devised these premises to Samuel Jewett for life, remainder to the demandant and others; and Samuel Jewett died less than five years before this action was brought. The demandant had no seisin of these premises, nor any right of entry, which would have enabled him to maintain this action, until after the death of his father, the tenant for life. *Wells* v. *Prince*, 4 Mass. 67, 68. He was, therefore, under a legal disability, within the spirit and legal meaning, if not within

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the strict letter, of the statute, and is not barred by the lapse of more than five years from the execution and delivery of the deed to the tenant's grantor. *Judgment for the demandant.*

LOUISA A. RHOADES *vs.* NATHAN ALLEN.

A claim against an administrator, for services performed for his intestate's estate while under his charge, is not taken out of the statute of limitations by a letter from the administrator to the creditor, saying: "On reflection, I do not think what labor you performed for the estate would be worth $100. Most of your labor was directly for or on account of the widow. My impression is, that you could not collect directly of me, as administrator, anything. It must be done through the widow. I do not mention this legal objection to get rid of anything, but to direct you in settlement with the widow. When the matter comes up, I shall be disposed to do what is right and just. I think you had better do something at once towards settlement with the widow, as I want to square up things all round."

ACTION OF CONTRACT for services claimed to have been rendered by the plaintiff to the defendant while the latter was administrator of the estate of Dr. Spaulding, more than six years before the date of the plaintiff's writ. The defendant pleaded the statute of limitations, which was admitted to be a sufficient bar to the action, unless the following letter, which was written and received within six years of the commencement of the action, was a sufficient acknowledgment or new promise to interrupt the operation of the statute:

"Lowell, April 2d 1851.

"Miss Rhoades: I have time to write only a line. On reflection I do not think what labor you performed for the estate would be worth over $75 to $100, including board, in the whole. Most of your labor was directly for or on account of Mrs. Spaulding. Since seeing you, it has occurred to me that it is doubtful whether any legal claim can be made against me or the estate. I obtained a legal discharge by regular process of law; and my impression is that you could not collect directly of me, as administrator, anything. It must be done through

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Mrs. Spaulding. I do not mention this legal objection to get rid of anything, but to direct you in settlement with Mrs. S. When the matter comes up, I shall be disposed to do what is right and just. I think you had better do something at once towards settlement with Mrs. S., as I want to square up things all round — Mrs. S. and Dr. U. soon. You must not use or refer to my advice in proceeding as to the price of labor against the estate, as that might show collusion. But when things are examined and exposed, as they probably will have to be, you will find me disposed to do right. I am full of business and schools; examinations every day. My visit to Salem was pleasant and satisfactory. Yours &c. N. Allen."

E. W. Kimball, for the plaintiff. Either an acknowledgment or a promise, in writing, is sufficient to take a debt out of the operation of the statute of limitations. Rev. Sts. *c.* 120, § 13. *Baxter* v. *Penniman*, 8 Mass. 133. *Bangs* v. *Hall*, 2 Pick. 368. *Whitney* v. *Bigelow*, 4 Pick. 110. *Woodbridge* v. *Allen*, 12 Met. 470. *Bell* v. *Morrison*, 1 Pet. 351. Story on Con. §§ 1013, 1014. This case shows both an acknowledgment and a promise. The words in the letter, "for the estate," are agreed to refer to services performed by the plaintiff for the defendant while administrator, and, taken in connection with the rest of the letter, admit an existing debt which had not been settled. The words "I will do what is just and right" contain a promise to pay. *Galway* v. *Barrymore*, 1 Dick. 163, quoted by Metcalf *arguendo*, in *Fiske* v. *Needham*, 11 Mass. 453.

S. H. Phillips & J. A. Gillis, for the defendant.

Metcalf, J. The statute bar to the action is not removed by the defendant's letter to the plaintiff, which neither acknowledges that she has a legal claim against him, nor makes any promise to pay her claim. See *Bangs* v. *Hall*, 2 Pick. 368; *Bailey* v. *Crane*, 21 Pick. 323; *Purdy* v. *Austin*, 3 Wend. 187; *M Culloch* v. *Dawes*, 9 D. & R. 40; *Morrell* v. *Frith*, 3 M. & W. 402.

Judgment for the defendant.

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Albert R. Brewster *vs.* James W. Bailey.

A notice, signed by a mortgagee of personal property, and delivered to a deputy sheriff who has attached the property on a writ against the mortgagor, is sufficient under Rev. Sts. c. 90, § 79, if it notifies him to deliver up the property, and describes the mortgage and the notes secured thereby, although it does not contain an express demand of payment.

A demand of payment under Rev. Sts. c. 90, § 79, by a mortgagee of personal property on an attaching officer, may state the full amount of the debt, without deducting what the mortgagor might deduct on the ground of a usurious consideration.

Action of tort against a deputy sheriff for taking and carrying away chattels attached by him on mesne process against Jonathan J. Sawyer.

At the trial in the court of common pleas, the plaintiff, to prove his title, gave in evidence a mortgage of the property from Sawyer to himself to secure the payment of four notes for the sum of $250 each, and interest; and testified that, at the time of giving the mortgage, Sawyer owed him $476, and promised to pay him a bonus of $24, if he would lend him $500 more; that he accordingly lent him $500, and the $24 was included in the notes.

The plaintiff proved the delivery to the defendant of an instrument in writing, signed and sworn to by him before a justice of the peace, which was addressed to the defendant, and notified him to deliver up the property in question, "said property being mortgaged by said Sawyer to me by mortgage," (describing it,) "to secure the payment of four promissory notes" (described) and concluded, "and there is now justly and truly due to me upon said notes the sum of one thousand dollars and interest, being the full amount of said notes."

Briggs, J. instructed the jury that the delivery of this pape to the defendant was a sufficient demand as required by Rev. Sts. *c.* 90, §§ 78, 79; but did not instruct the jury whether the account in writing was upon the evidence a just and true account. The verdict was for the plaintiff, and the defendant alleged exceptions.

N. W. Harmon, for the defendant.

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D. Saunders, Jr., for the plaintiff.

MERRICK, J. Two objections are taken to the proceedings in the court below; but neither of them affords a sufficient reason for disturbing the verdict. Upon a proper construction of the written instrument which was signed by the plaintiff, and duly sworn to before a competent magistrate, according to his certificate thereto subjoined, its delivery to the defendant must be considered to be a substantial demand of payment from him; and we are satisfied, in view of the facts set forth in the bill of exceptions, that it contained a just and true amount of the aggregate sum which was due upon the notes secured by the mortgage held by the plaintiff.

It is true that no demand of payment is expressed in direct terms in the written instrument; but that is obviously the real effect and purport of it. It distinctly notified the defendant of the existence of the mortgage made by Sawyer, of the purpose for which it was given, of the property conveyed by it, and of the amount due upon the notes described in the condition of it. The object, purpose and meaning of this notice could not be mistaken. It was a claim to have the property delivered to th plaintiff, discharged and relieved from the attachment. And as it was liable to the debt of the plaintiff, and could be lawfully withheld from him under the attachment only upon condition that the debt secured by the mortgage should be first paid, the claim to be put into immediate possession of the property, accompanied by a full statement of all the facts and circumstances upon which the rights of both parties depended, comprehended by necessary implication a demand of the money which was due. That was sufficient, since no particular form of expression is requisite to constitute a demand of payment. Any language, which by a reasonable interpretation has that mport, is as significant and effectual as the use of other words, however direct or explicit they may be.

The account stated of the amount of the debt then due to the plaintiff, and for which the property attached by the defendant was liable, was correct and true. Sawyer, the mortgagor, might indeed, if an action had been brought against him to recover

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the contents of the several notes secured by the mortgage, have availed himself of the provisions of the statute respecting usury and the taking of unlawful interest, to diminish the amount of the plaintiff's claim. But this he has not done; nor is he required to do anything of the kind. He has a right to determine for himself whether, if called upon in a suit at law for payment, he will resort to any such defence to diminish the judgment which may be recovered against him. If he interposes no such objection, none of his creditors can do it for him or on his behalf. The statute does not invalidate a usurious contract, or render it wholly inoperative; but on the contrary expressly declares that no assurance for the payment of money with interest at a greater than the legal rate shall thereby be null and void. Rev. Sts. *c.* 35, § 2. The contract is a valid and legal obligation, subject only to the right given to the promisor to set off the prescribed penalty, when its amount has been duly ascertained, either as a complete or partial defence as the case may be. The sum of twenty four dollars, which Sawyer agreed to pay the plaintiff as a bonus for raising and loaning to him the sum of five hundred dollars, constituted a part of the consideration of the notes referred to and described in the written notice given to the defendant. But Sawyer makes no objection to the plaintiff's right to recover the whole contents of the notes without diminution; and the defendant in the present action has no authority to set it up or avail himself of it. As between him and the plaintiff therefore, the account stated in the written instrument delivered to him was just and true; and there was consequently no imperfection in this respect, in the notice which he received, to justify him in the detention of the property to which the plaintiff, upon the failure to pay him the amount of his debt, was entitled.

As the account rendered to the defendant was correct and right, it is wholly unimportant that the court omitted to give any instructions to the jury upon the subject. As a question of fact, it should properly have been submitted to their decision; and this we are to presume was done, as nothing to the contrary is shown in the exceptions. *Exceptions overruled.*

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Margaret Harris *vs.* Inhabitants of Marblehead.

A building committee of the selectmen of a town which had not been divided into territorial school districts selected a lot of land for a school-house, and, on the refusal of H., the owner, to sell it, applied to the selectmen to call a meeting of the town. At such a meeting, called "to see if the town will authorize the selectmen to select at their discretion a school-house lot," it was voted, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, from the land of H. heretofore selected by the town." *Held*, that this was not a sufficient designation of land by the town to authorize the selectmen to select out of it a school-house lot, under *St.* 1848, *c.* 237.

It seems, that a notice that the selectmen, in accordance with a vote of the town, will on a certain day lay out and assess damages for the taking of a lot of land, but not stating that it is for a school-house, is insufficient.

A town which, against the owner's will, illegally takes a lot of land for a school-house lot, and erects a school-house thereon, cannot be allowed anything for improvements, under the Rev. Sts. *c.* 101, §§ 19, 20.

Writ of entry by the widow and devisee of Ebenezer R. Harris to recover a lot of land in Marblehead. Plea, nul disseisin. Trial before *Merrick*, J., who reserved the following case for the decision of the full court:

The plaintiff gave in evidence her husband's title and his devise to her. The tenants claimed title by virtue of proceedings under *St.* 1848, *c.* 237, and the acts in addition thereto, authorizing towns to take lands for school-houses; there being no territorial school districts in the town. The records of the town were put in evidence, showing a call of a meeting of the legal voters of the town on the 30th of July 1853, "to see if the town will authorize the selectmen to select at their discretion a school-house lot, for the purpose of placing a school-house thereon;" at which meeting the town voted, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, not exceeding in quantity forty square rods exclusive of the land occupied by the buildings, from the land of the heirs of the late Ebenezer R. Harris, heretofore selected by the town, situated on Mechanic's Square." No evidence was introduced of any previous selection by the town. But it appeared that before this meeting a building committee of the selectmen had designated a

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portion of the demandant's land for a school-house lot, and offered to purchase it of her, but she refused to sell, and the committee then requested the selectmen to have this meeting called.

On the 8th of August 1853, the selectmen voted to "take the piece of land from the heirs of the late Ebenezer Harris, selected for a school-house lot, and pay two hundred and fifty dollars for the same."

On the 14th of October 1853, the selectmen of the town gave the following notice to the widow and heirs of Ebenezer Harris: "Please take notice that we, the undersigned, selectmen of Marblehead, in accordance with the instructions given us at a legal meeting of the inhabitants of the said town, will proceed to select, lay out, and assess the damages for taking a part of the lot of land, situated on Hayden's Hill, formerly so called, adjoining the lands of Samuel Manning and others, belonging to the heirs of the late Ebenezer R. Harris, at said lot, on Monday the twenty-fourth day of October inst. A. D. 1853, at two o'clock in the afternoon." At the time thus appointed, the selectmen proceeded to the land of the demandant, and staked off the lot in dispute, and tendered her the sum of two hundred and fifty dollars therefor, which she refused to accept; and the selectmen afterwards erected a school-house thereon, which has been since occupied as such by the town.

O. P. Lord & S. B. Ives, Jr., for the demandant.

S. H. Phillips & J. H. Robinson, for the tenants. By the Rev. Sts. *c.* 23, § 28, the inhabitants of any town "may, at any meeting called for that purpose, raise money for erecting or repairing school-houses in their respective districts," &c. &c.; "they may also determine in what part of their respective districts such school-houses shall stand, and may choose any committee to carry into effect the provisions aforesaid." By virtue of this statute the building committee were a legal committee to designate the place for a school-house.

"Whenever a suitable place shall have been designated, by any town or school district, for the erection of a school-house, agreeably to the provisions of the twenty-third chaper of the revised

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statutes, and the owner of the land shall refuse to sell the same, or shall demand therefor a price which in the opinion of the selectmen is unreasonable, the said selectmen, with the approbation of the town, may proceed to select at their discretion a school-house lot, and lay out the same." *St.* 1848, *c.* 237. Under this statute the designation to be made by the town is only a general designation of the place, out of which the selectmen must select a lot. And the acceptance by the town, at a meeting duly called, of the designation made by the building committee of the selectmen, is a designation by the town. The acts of the town meeting, called by the selectmen at the request of the building committee, who had designated the place and failed to purchase, were in accordance with the article in the warrant. *Blackburn* v. *Walpole*, 9 Pick. 97. *First Parish in Sutton* v. *Cole*, 3 Pick. 244.

The selection of a lot by the selectmen out of land already designated by the town was according to the requirement of *St.* 1848, *c.* 237; and "the approbation of the town" was sufficiently given by the vote of July 30th conferring authority on the selectmen. The selectmen duly gave notice to the owners, and appraised and tendered the amount of damages, and in all respects conformed to the *St.* of 1848, *c.* 237, and the fee thereby vested in the town. *School District in Norton* v. *Copeland*, 2 Gray, 414. *Tyler* v. *Hammond*, 11 Pick. 220. That statute is a constitutional exercise of the power of the legislature to take land for public uses. *Boston & Roxbury Milldam* v. *Newman*, 12 Pick. 481. *Wayland* v. *County Commissioners*, 4 Gray, 500.

If the tenants cannot hold the premises, yet, having hitherto held them under the proceedings in question by a title which they had reason to believe good, they are entitled to compensation for their buildings and improvements. Rev. Sts. *c.* 101, §§ 19, 20.

Thomas, J. Before any proceedings can be had under the *St.* of 1848, *c.* 237, and the *Sts.* of 1851, *c.* 186, and 1853, *c.* 149, and *c.* 347, in addition thereto, it is necessary that a suitable place shall have been designated by the town or school district

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for the erection of the school-house, agreeably to the provisions of *c.* 23 of the Rev. Sts.

By § 28 of that chapter the inhabitants of the district are to determine in what part of the district the school-house shall stand. By § 30, if the school district cannot agree upon a place, the selectmen of the town are to determine where it shall be placed. But towns may carry into effect the provisions of this chapter without forming school districts. § 24. So if school districts already exist, the town may, if it sees fit, carry into effect the provisions as to school-houses at the common expense of the town, and in such case the town may at any legal meeting raise money and adopt all other proper measures for this purpose. §§ 28, 32. The town of Marblehead so exercised this power of building the school-houses at the common expense.

As a necessary condition precedent to the exercise of the power conferred by the *St.* of 1848, it must appear that a suitable place had been designated for the school-house, and that the owner had either refused to sell, or demanded a price which in the opinion of the selectmen was unreasonable. Nothing can be more plain and explicit than the language of the statute § 1. Such designation of a suitable place for the school-house must be made at a legal meeting and by a vote duly recorded.

There is an entire failure to show any vote by the town, designating such suitable place for the school-house in question. The only meeting in which any action was had upon the subject is that of July 30th 1853. The article in the warrant was "to see if the town will authorize the selectmen to select at their discretion a school-house lot, for the purpose of placing a school-house thereon." The vote adopted was, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, not exceeding in quantity forty square rods exclusive of the land occupied by the buildings, from the land of the heirs of the late Ebenezer R. Harris, heretofore selected by the town, situated on Mechanic Square." "From land heretofore selected by the town"—when, at what meeting and by what vote, fails to appear.

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There is a recital of a selection — that is all. There is no evidence that such selection or designation was ever made; and it is, of course, for the tenants to show that the land was duly taken. In the absence of proof, we must presume it does not exist. The records given us of the earlier meetings show no action whatever on the subject of the lot for the school-house. The first and vital thing is wanting, that without which all the subsequent proceedings were useless ceremonies, to wit, the designation by the town of a suitable place.

If the vote of July 30th could be construed as authorizing the selectmen to designate a suitable place, it would not, we think, avail; for this is a discretion the town itself must use, and cannot delegate to its officers.

If we got beyond this point, there are other defects which would arrest our progress, and especially the insufficiency of the notice, in not stating the purpose for which the land was taken, or offering to the party a hearing.

A claim is made for betterments. Under the Rev. Sts. *c.* 101, §§ 19, 20, such claim may be made, provided the tenant holds under a title he had reason to believe good, that is, of whose defects he had no reasonable notice or warning. This does not apply to improvements made during the pendency of the controversy, and more especially where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house or any other building erected upon it. See §§ 29, 32, 33, 34, of *c.* 101. *Judgment for the demandant.*

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Joseph F. Peabody *vs.* James Brown, Jr.

A deed to "Hiram Gowing, cordwainer," may be shown by parol evidence of the previous negotiations between the parties to have been intended for "Hiram G. Gowing," who was a person of middle age, and not for "Hiram Gowing," his son, who was but thirteen years old.

Writ of entry to recover land in Danvers. Plea, nul disseisin. At the trial before the chief justice, both parties claimed title under a warranty deed made on the 5th of May 1841, by Henry F. Newhall, in consideration of $115, to "Hiram Gowing, of said Danvers, cordwainer."

The demandant contended that this deed conveyed the premises to Hiram Gowing, then a minor about thirteen years of age, who died in 1852, leaving his father, Hiram G. Gowing, his heir, who afterwards conveyed to the demandant.

The tenant claimed title under levies of executions against Hiram G. Gowing upon the estate in 1842 and 1843; and called Newhall as a witness, who, on inspection of the deed, testified that he executed it, that he now knew Hiram G. Gowing, but did not then know that he had any G. in his name; and he was about proceeding to testify, that the negotiation was with the father, who paid him the consideration, and that he supposed he was giving the deed to him; when the competency of this evidence and all parol evidence was objected to, as tending to show that, when there was a grantee named, Hiram Gowing, capable of taking the estate by conveyance, another grantee not bearing that name was intended, and in consequence of being so intended to take, the estate under that deed vested in him.

The demandant, objecting to all parol evidence of intention to control the operation of the deed, stated that if the tenant was allowed to go into such evidence, he should oppose it by evidence tending to show that the father was in fact acting for the son, and that the intent was to make a purchase for him, and that it was made with funds given to the son by some relative.

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The case was reserved for the whole court upon this agreement: "If the court are of opinion that it is not competent to go into the proposed evidence to show that, although the deed was executed as it was, and there was a person of that name, capable of taking by the deed, and no other person bearing the same name appearing, still it was intended for the father, bearing the same name with the addition of a middle initial letter, and under the circumstances would vest the estate in him, so that it could be levied upon on an execution against him, and taken to satisfy his debts, then judgment to be entered for the demandant. But if the court are of opinion that such evidence is admissible, and if the facts to be established by such proof would show that the deed vested the estate in the father, then the case to be submitted to a jury, to find upon the evidence, offered on both sides, whether such was the intent of the parties to the deed of Newhall to Gowing."

O. P. Lord, for the demandant, cited *Stackpole* v. *Arnold*, 11 Mass. 27.

I. Brown, for the tenant, cited 4 Cruise Dig. tit. 32, *c.* 21, §§ 10 *& seq.*; *Game* v. *Stiles*, 14 Pet. 322, and 1 McLean, 321; *Scanlan* v. *Wright*, 13 Pick. 523; *Doe* v. *Roe*, Geo. Decis. pt. I. 80.

Shaw, C. J. Where two names are distinguishable, such as George and James, or even where the names are much alike, as Edward and Edwin, both popularly called Ned, still being well known distinct Christian names, it is not competent to go into direct parol evidence that where Edward was written Edwin was intended. *Crawford* v. *Spencer*, 8 Cush. 418.

But where, taking the name and addition together, the deed fully applies to neither, it falls within the rule of a latent ambiguity.

Here it is "Hiram Gowing, cordwainer," and it is shown that the boy Hiram Gowing was only thirteen years old, not at the ordinary age even to commence an apprenticeship; it is in effect a latent ambiguity, and therefore opens the case for parol evidence. *New trial ordered.*

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Harley Newcomb *vs.* William Noble.

In replevin of property claimed under a mortgage, the deposition of the subscribing witness to the contents of the mortgage, and to his having seen the property described therein, is admissible to identify the property, although neither the mortgage nor any copy thereof is annexed to the depositions.

Replevin of a horse. Answer, property in the defendant. The plaintiff claimed title under a mortgage from Ignatius J. Hollis; and at the trial in the court of common pleas, in order to prove that the property replevied was the same described in the mortgage from Hollis, offered the deposition of his own son, in which he testified that, at the time of which this mortgage bore date, he read, and knew the contents of, and signed as witness a mortgage from Hollis of a horse which he described, and that the horse was at the time at his father's house. Neither the mortgage nor any copy thereof was annexed to the deposition. To the admission of this testimony the defendant objected, because it was either entirely immaterial, or stated the contents of a written instrument. But *Mellen*, C. J. overruled the objection, a verdict was returned for the plaintiff, and the defendant alleged exceptions.

E. W. Kimball, for the defendant.

The plaintiff submitted the case without argument.

By the Court. The evidence was competent to show that the horse in controversy in this action was the same as that included in the mortgage. This was the sole purpose for which it was offered and admitted. The contents of the mortgage were, we suppose, proved either by its production or by other competent evidence. *Exceptions overruled.*

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JOHN A. PUTNAM *vs.* JOHN TUTTLE.

A deed of land, *habendum* "with all the privileges and appurtenances to the same belonging excepting all the wood and trees on a certain island I reserve to the grantee his heirs and assigns forever," and concluding "it is to be understood that the wood above mentioned is reserved to the grantor and his heirs forever," reserves to the grantor an estate of inheritance in the wood and trees only then growing, with a right in the soil for their growth and nourishment, and the privilege of entering to take them away.

ACTION OF TORT for forcibly entering and cutting trees growing on the island mentioned in a deed made in 1751 by Charles Tuttle, Jr. (under whom the defendant claimed), to Nicholas Woodbury (whose title the plaintiff had) with this habendum: "To have and to hold the said granted and bargained premises with all the appurtenances and privileges to the same belonging excepting all the wood and trees on a certain island in abovesaid meadow I reserve to the said Nicholas Woodbury his heirs and assigns forever to his and their only proper use benefit and behoof forever;" and with this clause at the end of the deed, just before the signature: "It is to be understood that the wood above mentioned is reserved to Charles Tuttle Junior and his heirs forever." Most of the trees cut were not in existence in 1751. Upon the case above stated, the parties submitted the right of action and the rule of damages to the judgment of the court.

S. B. Ives, Jr., for the plaintiff.

D. E. Safford, for the defendant.

THOMAS, J. The question is what estate in the trees and the land on which they grew was reserved in the deed made by Charles Tuttle to Nicholas Woodbury in 1751. We think the reservation is of all the trees standing and growing upon the land when the deed was made, and of the use of the land for their growth and nourishment, and for cutting down and removing them.

The direct reservation is of the wood and trees on a certain island. This is clear and definite, and refers only to the wood and trees then standing and growing. The latter clause, which operates as a habendum, makes no new grant, but shows the

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tenure of that before made, that the wood and trees and the interest in the soil necessary for their growth are reserved to the grantor, not for his life, but in fee to him and his heirs forever — as if he had said, "I am to have the wood and trees now on the island in the meadow, but the right to take them is not personal to myself or limited to my life, but is also for my heirs."

A reservation of the right to the wood and trees forever growing on the land would be in effect a right in the soil itself for the growth and nourishment of trees so long, and so far as it was used for that purpose.

The case at bar is distinguishable from that of *Clap* v. *Draper*, 4 Mass. 266, in which the grant was to Humfrey, his heirs and assigns, of "all the trees and timber standing and growing on said land forever, with free liberty for them to cut and carry away said trees and timber at all times at their pleasure forever." The court put particular stress upon the word "forever" as applied to "the trees and timber standing and growing on the close" — growing on the close forever, instead of those merely standing at the time.

What was reserved by the deed in this case was the wood then on the island, but without limit as to the time when it should be removed. The defendant therefore is liable for all trees cut, not standing and growing on the island in 1751.

Case referred to an assessor to ascertain the value.

WILLIAM C. PRESCOTT, Receiver, *vs.* WILLIAM PULSIFER & another.

A debtor assigned to his creditor a mortgage of $500 as collateral security for the payment of his debt of $1400; he was afterward sued on the debt, and judgment rendered against him for the whole debt, and execution issued thereon and put into the hands of an officer, with instructions to collect $600, or obtain good security therefor; and the officer released the debtor upon receiving a promissory note for $600, which he indorsed to the creditor, who afterwards collected from the mortgagor the amount of the mortgage. *Held*, that

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in a suit upon the note the defendant, in order to show that the money received on the mortgage discharged the whole debt, might give in evidence an agreement in writing made by the parties, pending the former suit, by which, upon the payment by the debtor of $575 (which he had not since paid), the mortgage should be reassigned to him, otherwise judgment to be entered for that sum.

ACTION OF CONTRACT by the receiver of the Bowditch Mutual Fire Insurance Company upon a promissory note for $600, dated June 11th 1855, signed by the defendants, payable to Francis O. Irish, and by him indorsed to the plaintiff.

At the trial in this court at May term 1856 before *Merrick*, J., the plaintiff produced the note declared on, and rested his case.

The defendants, in opening, proposed to prove the following facts: The defendant William Pulsifer in 1850 was an agent of said company, and assigned to them, as collateral security for any sums then or thereafter due from him to the company, a promissory note of one Dunnels for $500, secured by mortgage of real estate. The company afterwards sued said Pulsifer on an indebtment of $1400, and pending that suit the parties executed the agreement copied in the margin.* Said Pulsifer paid $100, but no more, pursuant to that agreement. The suit was continued to November term 1854, when Pulsifer was defaulted, and judgment entered for the sum of $14,000, with interest and costs; and an execution issued thereon, which was placed by the

* Essex, ss. Supreme Judicial Court.

WILLIAM PULSIFER v. BOWDITCH M. F. INS. CO.

It is agreed by the parties the said Pulsifer shall pay the said company the sum of one hundred dollars in ten days from date, and the further sum of five hundred and seventy five dollars in six months from date; and the said company is to deliver and reassign to said Pulsifer a certain mortgage made by one Dunnels to said Pulsifer and assigned by him to said company as collateral security, together with the note secured by said mortgage; said security to be given up on payment of the above sums; and if said sums are not paid as above, then judgment to be entered in the above sums, together with interest from and after they become due as aforesaid; and that the action shall be continued till the November term of this court, in pursuance of this agreement.

Salem, March 8, 1844.

Bowditch M. F. Ins. Co.
by Wm. C. Prescott, Receiver.
Wm. Pulsifer.

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plaintiff in the hands of Irish, a deputy sheriff, with directions to collect $600 of Pulsifer or obtain good security therefor. Irish arrested Pulsifer, and discharged him from arrest on receiving the note now sued upon. The company afterwards commenced an action to foreclose the mortgage against Dunnels, who thereupon in July 1855 paid the amount of the mortgage note with interest and costs.

Said agreement was then offered in evidence by the defendants, but excluded by the presiding judge. A verdict was returned for the plaintiff, and the defendants alleged exceptions, which were argued and decided at November term 1856.

S. H. Phillips & W. G. Choate, for the defendants.

O. P. Lord & W. C. Endicott, for the plaintiff. The note declared on was given in part satisfaction of a judgment against one of the defendants, which, until reversed, is conclusive on the parties thereto, and a good consideration for this note, and cannot be contradicted by evidence of any agreement made respecting the action in which it was rendered. No evidence was offered tending to show that the note declared on had been paid, or that there was any collateral security for it.

Bigelow, J. The facts, which the defendants offered to prove, that the officer was instructed to collect on the execution $600 or obtain good security therefor, and that, pursuant to such directions, he did obtain the note for that amount, being the note now in suit, and thereupon discharged the party from arrest, were evidence tending to show that the company had agreed to take $600 in full satisfaction of the execution. And the agreement of the parties, made before the judgment was rendered, to settle the whole claim for about the same sum, was admissible for the same purpose, and as bearing on the question whether there was an agreement between the parties that the payment of the sum due on the mortgage pledged to said company as collateral security should be applied, when collected, to the payment in full of the note in suit. *Exceptions sustained.*

At a second trial before *Metcalf*, J., after the plaintiff had introduced the note and rested his case, the defendants, in

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opening, made the same offer of proof as at the first trial, and proposed to contend that the note in suit was paid by the money received by the plaintiff from Dunnels.

Irish, being called as a witness for the defendants, testified that the plaintiff put into his hand the execution against William Pulsifer, and stated to him that the company had security from Pulsifer, but that it fell $600 short of the amount due on the execution, and that Irish must collect $600 or obtain good security for it, or arrest said Pulsifer; that he told said Pulsifer what the plaintiff had directed him to do, and said Pulsifer thereupon gave the note in suit; but that he did not arrest said Pulsifer.

The defendants then offered in evidence the said agreement, "for the purpose of showing the amount that was due from said Pulsifer to the plaintiff, as agreed on by the parties;" and requested the judge to rule, that "if the note was taken in satisfaction of the judgment, and if the debt for which the Dunnels mortgage was given was the same as that for which the judgment was obtained, then the money received by the plaintiff upon the mortgage would discharge the note, either in whole or in part, as the case might be." But the judge refused to admit said agreement in evidence, "not deeming it competent to show that the former judgment was wrong and erroneous." The verdict was for the plaintiff, and the defendants alleged exceptions, which, after argument by *J. A. Gillis*, for the defendants, and *Lord & Endicott*, for the plaintiff, were now, upon the authority of the previous decision, *Sustained.*

GEORGE W. LATHROP *vs* JOHN M. GROSVENOR.

In an action on the covenant against incumbrances, the burden of proof is on the plaintiff to show that any incumbrance was lawful.

ACTION OF CONTRACT on the usual covenant against incumbrances in a deed of land from the defendant to the plaintiff

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The case was referred by rule of court to arbitrators, who awarded in favor of the plaintiff, subject to the opinion of the court on these facts: "The Boston and Maine Railroad, some eight years since, in the construction of their railroad across the Spicket River, laid the abutments of a bridge in such a manner as to obstruct the natural flow of the water of the river, (not navigable,) at certain times of the year, thereby causing the plaintiff's land to be flowed, for which the damages are claimed."

N. W. Harmon, for the plaintiff.

E. P. G. Marsh, for the defendant.

BIGELOW, J.* The plaintiff, on the facts stated in the report of the referees, is not entitled to the sum assessed for damages caused by the erection of a bridge by the Boston and Maine Railroad over the Spicket River. The burden of proof was on the plaintiff to show a breach of the covenant against incumbrances. To show such breach by the erection of the bridge, which caused water to flow back on his land, it was necessary for him to establish a legal right in the Boston and Maine Railroad to obstruct the stream. The defendant did not covenant against the unlawful and tortious acts or trespasses of third persons, but only against such rights or easements in the premises conveyed as constituted legal incumbrances thereon. It does not appear by the report of the referees, that any evidence was offered by the plaintiff as to the mode in which the bridge was built, or whether it was lawfully erected over the river by the railroad corporation. If it was built in a reasonable and proper manner, within the due exercise of the power conferred on the corporation by their franchise, and for the purpose of constructing their road in a convenient and suitable manner, then it was a lawful erection, and the right to flow back water on the land conveyed to the plaintiff by the defendant would be a lawful incumbrance, for which an action of covenant would lie. But if the bridge was built in a mode not required for the due,

* This case was decided, and the subsequent cases were argued, at Boston in January 1858; present all the judges but THOMAS, J.

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reasonable and proper construction of the road, or the obstruction of the stream was a wanton and careless act on the part of the railroad corporation, not necessary to the due exercise of its franchise, then there was no breach of covenant. In such case, the acts of the railroad were tortious and unlawful, and the plaintiff's remedy therefor was by an action of tort against the railroad corporation. *Mellen* v. *Western Railroad*, 4 Gray, 301. *Perry* v. *Worcester*, 6 Gray, 544.

GORDON K. TYLER & another *vs.* WILLIAM CURRIER & others.

Under *St.* 1855, *c.* 231, giving a lien upon ships for labor or materials, to be enforced by petition to the court of common pleas "in the manner provided by" the Rev. Sts. *c.* 117, §§ 4 *et seq.*, a petition cannot be filed until the debt sought to be secured has remained unpaid sixty days after it has been payable, as provided by the Rev. Sts. *c.* 117, § 4, in case of liens on buildings.

PETITION, inserted in a writ and filed in the court of common pleas on the 20th of May 1856, to enforce a lien upon two vessels under *St.* 1855, *c.* 231, for timber sold and delivered by the petitioners to the respondents on the 14th of April 1856. The respondents contended that the petition was prematurely brought, because the sum for which the lien was claimed had not been due and unpaid for sixty days; and relied on the provision of *St.* 1855, *c.* 231, § 3, that "such lien may be enforced by petition to the court of common pleas, in the manner provided by the fourth and subsequent sections of the one hundred and seventeenth chapter of the revised statutes," and the provision of the Rev. Sts. *c.* 117, § 4, that "when any sum due by such contract shall remain unpaid for the space of sixty days after the same is payable, the creditor may, upon a petition to the court of common pleas," obtain a decree. But *Briggs*, J. overruled the objection, and entered a decree for the petitioners. The respondents alleged exceptions.

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C. T. Russell, for the respondents.

O. P. Lord & W. C. Endicott, for the petitioners. The provision of the Rev. Sts. *c.* 117, § 4, that the creditor shall not bring his petition until sixty days after the sum due is payable, is no part of "the manner of enforcing the petition;" but merely specifies the time requisite to complete the lien, as indicated by the provision of § 1, that he "shall have a lien in the manner hereinafter provided." The Rev. Sts. *c.* 117 thus give a lien after the sixty days only; the *St.* of 1855, *c.* 231, § 1, gives a lien immediately. To extend this postponement of proceedings against immovable property, to a ship afloat and which may go away at any moment, would often defeat the lien. And see *St.* 1855, *c.* 231, § 2. Even in the case of buildings and land, this postponement of remedy has now been abolished. *Sts.* 1851, *c* 343; 1852, *c.* 307.

METCALF, J. The court are of opinion that this petition was prematurely brought, and, for that reason, if for no other, cannot be granted. The *St.* of 1855, *c.* 231, on which this petition is founded, provides, by § 3, that the lien therein given on ships and vessels "may be enforced by petition to the court of common pleas, in the manner provided by the fourth and subsequent sections of the one hundred and seventeenth chapter of the revised statutes." The Rev. Sts. *c.* 117 provide for the lien of mechanics on the land upon which buildings are erected, in the erecting or repairing of which they have, by contract, furnished labor or materials; and by § 4, "when any sum due by such contract shall remain unpaid for the space of sixty days after the same is payable, the creditor may, upon petition to the court of common pleas for the county where the land lies, obtain a decree for the sale thereof, and for applying the proceeds to the discharge of his demand." The subsequent sections relate to the filing of the petition, its contents, the notice to be ordered by the court, proof of claims, trial of questions of fact, order for sale, &c. And these petitioners do not deny that they are required, by *St.* 1855, *c.* 231, § 3, to conform their proceedings, in the present case, to the provisions of the sections subsequent to § 4 in *c.* 117 of the revised statutes. But they take the

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position, that the provision in the revised statutes, that the creditor shall not bring his petition until sixty days after the sum due is payable, is no part of the "manner of enforcing the petition." We think otherwise. There is no limitation, unless it be that of sixty days; and it is not to be supposed that the legislature intended to authorize the enforcement forthwith of a lien on ships and vessels. If they had intended that such lien might be enforced sooner than a mechanic's lien might, we doubt not they would have so expressly provided. If the restriction as to time is not adopted, suits may be commenced in one day after the debts become due, and vessels be arrested, and large costs incurred. The restriction gives time for adjustment, notice and arrangements, and tends to prevent the hasty, vexatious or unreasonable use of the remedy.

By *St.* 1845, *c.* 163, § 8, "the same remedies" were given to persons whose property should be damaged by the Essex Company, by flowing, &c., as were provided by the Rev. Sts. *c.* 39, for persons damaged by railroad corporations; and by § 58 of that chapter, an application to the county commissioners for an estimate of damages for property taken by such corporations was required to be made within three years from the time of the taking thereof. It was held, in *Call* v. *County Commissioners*, 2 Gray, 232, that an application for an estimate of damages done by the Essex Company, by flowing land, must be made within three years of the erection of the company's dam, although it was contended that the provision for "the same remedies," as were given against railroad corporations, related to the form only of the remedy, and did not attach the limitation of three years. That case is analogous to this.

Exceptions sustained.[*]

[*] A libel in admiralty to enforce the lien given by *St.* 1855, *c.* 231, may be filed at once. *The Richard Busteed*, Sprague, 449 *& seq.*

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JOSEPH B. F. OSGOOD & another *vs.* HENRY B. FERNALD, Judge of Insolvency.

Jurisdiction in proceedings in insolvency, pending before a commissioner when the *St.* of 1856, *c.* 284, took effect, vested upon his subsequent death in the judge of insolvency, and not in the judge of probate.

SHAW, C. J. It appears by the petition of Joseph B. F. Osgood and Jairus W. Perry, that insolvent proceedings were commenced before John G. King, Esq., late commissioner of insolvency for the county of Essex, on the 1st of July 1856, by the issue of a warrant, on the application of Joseph Shotswell; that afterwards, in due course of said proceedings, Shotswell was adjudged an insolvent debtor; that Osgood was duly appointed clerk by said commissioner, and Perry having been duly chosen assignee, the estate and property of Shotswell were duly assigned to him by the commissioner. These proceedings were continued in a due course of administration until July 1857, at which time the said commissioner, John G. King, died.

On recurring to the statute establishing courts of insolvency, we find that the act passed on the 6th of June 1856, and took effect thirty days after, on the 6th of July 1856. *St.* 1856, *c.* 284. By § 40 of that act it is provided that the act shall not affect any case in insolvency, which shall have been commenced before the act shall take effect. These proceedings having been rightly commenced before Commissioner King six days before this act went into operation, by force of the statute he continued to have the entire jurisdiction of the proceedings until his decease.

But it now appears, that at the decease of Mr. King the estate of Shotswell remained unsettled, no dividend of the assets in the hands of the assignee had been made, and a question arose whether the authority of taking jurisdiction of the unfinished proceedings of an insolvent estate was vested by law in

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the judge of probate of the county, or in the judge of the court of insolvency.

The petitioners further show that they made a written application to the Hon. Henry B. Fernald, judge of the court of insolvency, requiring him to take jurisdiction of the said proceedings in insolvency, and to hold the meetings theretofore ordered by said commissioner in his lifetime, but the said Fernald declined and refused to take jurisdiction of said proceedings and to hold said meetings, for the reason, as he said, that the statutes gave him no authority in such cases. And the petitioners pray for a mandamus to the said Fernald, then and now judge of the court of insolvency for this county, requiring him to take jurisdiction of the said insolvent proceedings, and do all proper acts necessary to the due and orderly settlement of said estate.

The question arises, upon the construction of the statutes, In whom the law vests the prosecution of unfinished insolvent proceedings, when the commissioner, before whom they were commenced and are rightly proceeding, has deceased after the act establishing a court of insolvency came into operation? So many changes have been made in the provisions of the insolvent laws during the twenty years they have been in force, and the jurisdiction so often changed, having at different times been vested in judges of probate, masters in chancery, and now in a regularly constituted court of insolvency, it is not surprising that some doubt should be reasonably entertained on this subject. But it is obviously of great importance that all doubt, practically affecting so many interests, should be removed; and we have therefore paid the earliest attention to the question.

It is certain that whilst the general jurisdiction was vested in commissioners, and up to the time of the establishment of the court of insolvency, the law was, that if a commissioner should die, the jurisdiction of all unfinished insolvent proceedings pending before him should be transferred to the judge of probate. The question is, whether this course of legal proceedings was altered by the *St.* of 1856, *c.* 284, and the establishment of a court of insolvency. This act provides, in § 2, that the judges

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of insolvency "shall have and exercise all the jurisdiction, power and authority that commissioners of insolvency now have and exercise" under the insolvent laws, that is, of originating all proceedings; "and all the provisions in said acts contained shall apply in like manner to said judges respectively as they apply to judges of probate, masters in chancery and commissioners of insolvency, except so far as said provisions or any of them may be by this act modified or repealed."

Now one of the functions of the judges of probate, at the time of passing the act, was to take and exercise jurisdiction over all unfinished proceedings pending before commissioners of insolvency at the time of their decease; and we think that those anterior provisions, which vested such jurisdiction in judges of probate, were by force of this clause declared to apply to judges of insolvency, and vested the same jurisdiction in them, on the decease of a commissioner, which had before been vested in judges of probate. And nothing in other parts of the act seems to us to alter or modify this construction.

We now recur again to § 40, which provides that "this act hall not affect any case in insolvency now commenced, or that shall hereafter be commenced before this act shall take effect; and the judge of probate, master in chancery or commissioner, before whom any such cases may be pending at the time this act shall take effect, shall have the same jurisdiction, power and authority in respect to them as they now have."

A doubt, perhaps the principal doubt, has been suggested on the first clause of this section, "shall not affect any case pending before a commissioner when this act takes effect." It is plausibly said, if the proceeding is not to be affected, the consequence is, that if the commissioner dies, the proceedings will be transferred to the judge of probate, because such was the law before. But the two parts must be construed together. The latter clause of the statute, after stating that this act shall not affect, &c. is, that the judge of probate, master in chancery or commissioner before whom, &c. shall have the same jurisdiction, &c. Now there are two cases in which the judge of probate might at that time have had jurisdiction; first, cases

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pending from the time when judges of probate had original jurisdiction; and secondly, cases in which commissioners had before that time died, and their unfinished cases had then been already transferred to the judges of probate.

Taking the whole section together therefore, our opinion is, that it was the intention of the law to continue the jurisdictio of judges of probate, where it had vested already in either of these cases, and also to the masters in chancery and commissioners of insolvency, in cases where they had already then acquired jurisdiction, and to enable them to complete the cases they had thus begun, and the purpose of the whole section was to accomplish this object; and it was not intended to confer jurisdiction in any case in which it had not then attached.

Then the next section, § 41, repeals "so much of the several acts to which this is in addition, as gives jurisdiction to judges of probate, masters in chancery and commissioners of insolvency," and all other inconsistent provisions.

We think this repeal does devest the jurisdiction given to judges of probate over unfinished proceedings, on the decease of commissioners, as well as the original jurisdiction of commissioners of insolvency.

Then if we are right in the construction of the second section, that all other jurisdiction, not actually vested in a judge of probate, shall hereafter vest in a judge of insolvency, which, though not so clearly expressed in terms as it might be, seems to us to be a fair construction of the provision, it brings the different parts of the act into harmony with each other, and best carries out the intent of the legislature.

Besides, it is plainly more consistent with the policy of the law, on establishing a regularly constituted court of insolvency, with its seal, its recording officer, and permanent judge, to hold that all jurisdiction in insolvency proceedings, not actually vested in other officers, should be transferred to that court; and it would be inconsistent with that policy to go back and establish so anomalous a proceeding as to vest a special jurisdiction in the probate court in an exceptional case without any apparent object to be obtained. See *Dearborn* v. *Ames*, 8 Gray, 1.

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The court are all of opinion that a proper mandate go to the judge of the court of insolvency for the county of Essex, requiring him to take and exercise jurisdiction in the case in question.

W. C. Endicott, for the petitioners.

INCREASE H. BROWN *vs.* THOMAS STONE.

In a controversy between proprietors of adjacent estates as to the width of a passage way between them, the descriptions in deeds of the estates to one under whom both proprietors claim title are admissible in evidence.

The owner of a right of way over a passage way may, for the purpose of keeping the way fit for use, disturb the soil and pave or repair it, making no material change in its condition, nor interfering with the estates of others in the way.

ACTION OF TORT for forcibly entering the plaintiff's close in Marblehead, digging up the soil and carrying away the pavement. Answer, that the acts complained of were done lawfully, under the authority of Joseph G. Wooldredge, upon land between the dwelling-houses of the plaintiff and Wooldredge, over which both had a common right of way.

At the trial in the court of common pleas, before *Perkins*, J., both parties claimed title, through several mesne conveyances, under John Nutt's will, made in 1775, when he owned both estates. The deed under which plaintiff claimed, and several of the preceding conveyances since the devise of Nutt, bounded the plaintiff westerly on the estate of Wooldredge; and the deed of Wooldredge, and several of the preceding conveyances since Nutt's devise, bounded his estate easterly on the passage way between the premises and the plaintiff's estate. The plaintiff contended that this passage way included the whole open space between the two houses. The defendant contended that it was a much narrower way, of about three or four feet, by the side of the plaintiff's house.

As evidence of the width of the passage way, the defendant

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was permitted, against the plaintiff's objection, to put in deeds of Wooldredge's estate from Daniel Felton and wife to Daniel Felton Jr., and from Daniel Felton Jr. to Nutt, and an intermediate deed from Felton and wife to Nutt of the plaintiff's estate, the measurements in which would give a passage way of the width contended for by the plaintiff.

There was evidence, introduced without objection, tending to show that the tenants in the house of Wooldredge had constantly made use of the whole of this space between the two houses for a long period of time, and also that the tenants in the plaintiff's house not only had not used, but some of them had disclaimed any right to use the said open space or yard.

The court directed the jury "that the plaintiff would hold, as he claimed, by the description in the deeds of conveyance from John Nutt through several intermediate conveyances to himself; but as the plaintiff's estate was bounded westerly on the estate of Wooldredge, and Wooldredge's estate was bounded easterly on a passage way between his premises and the estate of plaintiff, and as no width or other description of said passage way or the uses to which it was to be put was given, the jury would judge from all the evidence before them whether the passage way was only so much as claimed by the defendant, or a larger width, or the whole distance between the houses, as claimed by the plaintiff; that the mere fact that there was an open space of eight feet between the houses did not necessarily show that the passage way referred to in the deeds was eight feet wide; the jury would look to the whole evidence, and say whether the passage way referred to was the whole space between the houses, or a less width, or the width claimed by the defendant; that if the jury were satisfied from the evidence that there was a passage way actually laid out there by Daniel Felton, marked and distinguishable on the ground, of the width claimed by the defendant, and that remained an open and well known passage way, used as such, and was the passage way referred to in the deeds from Nutt to Wooldredge, then the plaintiff's estate would extend no farther than to the westerly side of said passage, and Wooldredge's estate would go only

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to the westerly side of said passage way; the whole estate having been vested in Nutt by the deeds from Felton, that would clear the estate from all tenancies in common and all rights of way and passages as such; and those deeds were evidence only on the extent and limits of said passage way, if the jury were satisfied that one was laid out and established and remained open and known as such in fact upon the premises, while the whole estate was in the hands of Nutt, and occupied by his tenants and after his conveyances to his grantees."

The court stated "that if, as the defendant claimed, Wooldredge and the plaintiff were tenants and owners in common of the whole land between the two houses, this action for trespass thereon could not be sustained against Wooldredge, nor against the defendant acting by his authority; but as the case stood this point did not arise, as it was evident there was no tenancy in common; that at all events there was a passage way somewhere between the houses, upon which it was admitted that the said Wooldredge had a right of way and no more; and that the plaintiff was the owner in fee of the land over which that way passed, whatever might be its width."

The plaintiff's evidence tended to show that the defendant entered upon said passage way, and dug up the soil thereof, and took and carried away the paving stones therefrom and converted the same to his own use. The defendant's evidence tended to show that he took nothing from the passage way, but left it in as good or better condition than he found it.

The plaintiff requested the court to instruct the jury "that if the defendant entered upon said passage way and dug up the soil, and took and carried away the quantity of paving stones, as alleged, as matter of law such acts would not be a legal use of such passage way." But the court ruled "that the defendant, standing as it was agreed in the place of Wooldredge, and having thus a right to use the way over said passage, might on behalf of Wooldredge make every fair and reasonable use of it as such way; he might use the surface for passing and repassing, and he might enter upon it for the purpose of preparing, repairing and keeping the way in order for such use as Wool-

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dredge was entitled to; and for that purpose and to that extent he might disturb the soil or surface, dig up the paving and repave the way to the extent necessary and suitable for repairing and keeping the same in order; that the jury would ascertain what if any of the acts complained of the defendant had done if the acts done by the defendant had not exceeded Wooldredge's right to the use of this as a way for the purpose of passing and repassing and keeping it in order as above, defendant would not be liable; but if he had exceeded such use, he would be liable for the damage done."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions, which were argued at the last term.

J. H. Robinson, for the plaintiff.

A. A. Abbott, for the defendant.

Merrick, J. The plaintiff's land is bounded, on its westerly side, by the land of Joseph C. Wooldredge; and the land belonging to the latter is bounded on its easterly side by a passage way situate between the dwelling-houses on their respective estates. They disagree in relation to the extent and width of this way; and this disagreement constituted the subject of inquiry, and was the chief point in controversy upon the trial of this action. The question respecting which the parties were thus at issue was a mere question of fact; its determination depended wholly upon the effect to be allowed to the evidence in the case, and the inferences justly to be drawn from it, and not at all upon any contested construction of the contents of the several deeds which they had respectively produced, concerning which no difference of opinion appears to have been entertained or expressed. It was a matter therefore strictly within the province of the jury, and was of course very properly left to their decision.

The defendant contended that the way by which the estate of Wooldredge was bounded was located in the same place, and was of the same width and extent, as the passage way mentioned in the deed from Daniel Felton to John Nutt, under whom both the parties to this suit derive their titles. For the purpose of proving the locality, and the space which the last

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mentioned way occupied, he was allowed to introduce the deeds of Felton to Nutt and to Felton Jr. This was correct; for the existence, extent and width of that way constituted a part of the facts essential to the maintenance of the defence relied upon. And in reference to those deeds, and to all the evidence having any bearing upon the particular question upon which the parties were at issue, the jury were rightly instructed that if a passage way, marked and distinguishable on the ground, was in fact actually laid out there by Daniel Felton, and if that was the same passage way which is referred to in the several deeds from Nutt and his assigns to Wooldredge, the plaintiff's estate would not extend beyond its westerly side, but would be defined and limited by it. Under such instructions, it is obvious that whatever tended to establish the precise locality and exact extent of the way laid out by Felton must have been admissible as competent and pertinent evidence.

The law in relation to the rights of tenants in common was accurately stated by the presiding judge. But as no such tenancy was shown to have at any time existed in which the parties had any interest, although the law upon that subject seems to have been somewhat considered and discussed, the principles laid down by the court had no bearing upon the final decision of the case, and of this the jury were fully and satisfactorily advised. Whatever was said upon that subject therefore affords the plaintiff no just cause of complaint.

As the right of way belonged to Wooldredge, it was lawful for him to do any work upon its surface, which was necessary, fit and proper to be done there to enable him to use and enjoy his right in it in a manner beneficial and advantageous to himself, provided he did not thereby make any material change in the state and condition of the soil, or disturb or interfere with the estate or privileges of other persons therein. For this purpose and within this limitation, his acts in the preparation, repair or improvement of the way were justifiable, and could not be treated or resisted as a trespass by an owner of the land who held it in fee subject to such an easement. *Appleton* v. *Fullerton*, 1 Gray, 186. This is the right of Wooldredge; and if the

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defendant, acting under his license and authority, did in no particular exceed it, he was not liable to the plaintiff for any damage alleged to have been done by him. The instructions given to the jury upon this subject were to this effect, and were consequently unobjectionable. *Exceptions overruled.*

ALBERT W. SMITH *vs.* SAMUEL PORTER.

A grant of "liberty to pass and repass over my land where it is necessary," confers a right of way to and from those lands only which the grantee owns at the date of the deed; and the burden of proof is on him and those claiming under him, if sued as trespassers, to show what those lands were.

The date of a deed is *prima facie* evidence of the time of its execution.

ACTION OF TORT for breaking and entering the plaintiff's close. Answer, a right of way over the close. Trial and verdict for the plaintiff in the court of common pleas before *Mellen*, C. J., to whose rulings the defendant alleged exceptions, the substance of which appears in the opinion.

D. Roberts, for the defendant.

J. A. Gillis, for the plaintiff.

MERRICK, J. It appears from the statements in the bill of exceptions, and by reference to the plan used at the argument, which, it is agreed, designates, with sufficient accuracy for the purpose of the present inquiry, the location and boundaries of the adjoining estates belonging to the parties, that the defendant is the owner of two lots or parcels of land, separated from each other by intervening lands belonging partly to Giddings and partly to the plaintiff. One of these lots is bounded upon a public highway; to the other the defendant has no means of access, except by passing from the one in front across the adjoining land of some other proprietor. For this purpose he claims that he has a right of way over the plaintiff's land by virtue of an express grant made to Matthew Whipple, under whom he claims, by John Whipple, from whom through several

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intermediate conveyances the plaintiff derives his title to the estate upon which the alleged trespass was committed.

By his deed dated the 3d of April 1798, John Whipple, being the owner of the land now owned by the plaintiff, granted "to Matthew Whipple, his heirs and assigns forever, liberty to pass and repass over my land where it is necessary." By this conveyance Matthew Whipple acquired a perpetual right of way to and from all the lands of which he was seised and possessed at the date of that deed. It is not pretended, nor could that position have been maintained, if it had been assumed, that this servitude extended to, or could have been availed of by the grantee in connection with, any other lands to which he might subsequently have acquired a title. *Stearns* v. *Mullen*, 4 Gray, 151. And accordingly it became material to ascertain and determine, upon the trial of the present action, whether Matthew Whipple was at the time of that grant an owner of the whole, or of any part of the two lots now belonging to the defendant. The rear lot of the latter evidently consists of land which once constituted two separate parcels, but left lying in common with each other, one of which contained about eighteen acres and the other one and a half acres. Of each of these last named parcels Matthew Whipple was certainly at one time or another the owner; for by his deed dated April 5th 1797 he conveyed the eighteen acre lot to Nathan Poland, who subsequently conveyed it to Dudley Porter, the defendant's father, and by his deed dated March 23d 1808 he conveyed the acre and a half lot to Dudley Porter. But still the question remained whether he owned or had any interest in either of the parcels, when he took the aforementioned grant from his brother John on the 3d of April 1798. The court instructed the jury that upon the issue to be determined by them, the burden of proof was upon the defendant to show affirmatively that Matthew was at that time the owner of one or both of these parcels; and that in the absence of any proof as to the time of the actual delivery of the deed from Matthew Whipple to Poland it would be the presumption of law that it was delivered at its date, and that the title to the estate thus passed from the grantor to the grantee.

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The jury having upon the issue submitted to them and upon this question found a verdict for the plaintiff, these instructions were excepted to by the defendant. But they were correct in both particulars. The defendant set up and asserted that he had a right of way over the plaintiff's land. This was in avoidance of the action. If true, it constituted a complete justification of the acts complained of, and was a perfect defence. But to avail himself of it, it was indispensable, according to the well settled rule of law, that he should first establish the truth of his allegations by satisfactory proof; and this, in the particular aspect of the case when the instructions objected to were given, he could only do by showing that Matthew Whipple was the owner of the land referred to on the 3d of April 1798. The burden of proof was therefore necessarily upon him to establish that essential fact. Whatever opinions may have prevailed heretofore, the law is now well settled, that the burden of proof, when it once devolves upon a party, never afterwards, in relation to the same question, shifts, in the progress of the trial, over upon his adversary. *Commonwealth* v. *McKie*, 1 Gray, 61. *Burnham* v. *Allen*, 1 Gray, 496. *Crowninshield* v. *Crowninshield*, 2 Gray, 524. *Alden* v. *Pearson*, 3 Gray, 342. *Phelps* v. *Cutler*, 4 Gray, 137. *Commonwealth* v. *Daley*, 4 Gray, 209.

All deeds and contracts ought regularly to be dated on the day of their execution. This is important for a great variety of purposes. The rights of the contracting parties are not unfrequently made to depend upon an accurate statement of time. Accordingly it is found by experience that in the prudent management of affairs this rule is commonly recognized as useful and observed with care. And this being at once the usual and proper manner of conducting a transaction of this kind, it may well be considered reasonable and safe to conclude, in any particular instance, where there is no other evidence upon the subject, that any legal instrument by which property is conveyed was completed on the day on which it bears date. The principle, *omnia presumunter rite acta*, is not confined merely to official proceedings, or the doings of public bodies, but has been extended to acts of private individuals, especially when they

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are of a formal character, as writings under seal. 1 Phil. Ev. (8th ed.) 470. The instruction of the court respecting the effect to be given to the deed of Matthew Whipple to Nathan Poland was in conformity to this rule, and adapted to the state of the evidence upon which it was called for. It is of little importance that the deed was not acknowledged on the same day on which it purports to have been executed, but on the 17th of January 1806. It is well known that in this commonwealth the title to land, followed by a corresponding seisin and possession, often passes by instruments of conveyance which are not duly acknowledged; and accordingly the law will not allow a title to fail on account of such omission, but has made suitable provision for supplying the defect of an acknowledgment, where it is found to exist. Rev. Sts. *c.* 59, § 14.

It is wholly unnecessary to consider whether the instructions given by the court, or asked for by the counsel for the defendant, respecting a right of way by necessity, were correct; because there was no evidence in the case, which could possibly give occasion for their application. It does not appear that the plaintiff, or any person under or from whom he derives his title to the land over which the right of way is claimed, ever owned, conveyed or had any interest in the whole or any part of the estate of the defendant. As against the plaintiff, therefore, there was no pretence for asserting that the right contended for could be acquired by operation of law as a way of necessity.

Exceptions overruled.

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GEORGE W. COOK *vs.* SAMUEL FARRINGTON.

A conveyed to B a lot of land bounded "south on a passage way twenty feet wide," "also such rights on the beach lying directly between the passage way and the sea, as were conveyed to the grantor by F, by a deed which passed the beach as appurtenant. B conveyed to C this lot, describing it as "bounded southeasterly on a passage way," and as "entitled to the privilege, mentioned in a deed from F to A, to which reference for further particulars may be had." *Held*, that the beach passed under both deeds.

ACTION OF TORT for breaking and entering a close in Lynn, consisting of a beach between high and low water mark and within one hundred rods of the upland. The entry was admitted, and the parties submitted the case to the decision of the court upon the following facts:

The defendant's title was as follows: On the 12th of April 1847 Joseph Fuller and Daniel Fuller conveyed to Nathan D. Chase and George Foster a tract of land, bounded southeastwardly on the sea, "with the privilege of a passage way twenty feet wide over land of said grantors eastward to the beach," which adjoined and was appurtenant to the land granted. On the 17th of April 1847 Chase and Foster conveyed to William Collins part of this land, designated as "lot No. 8," adjoining the beach in question, and bounded "north on lot No. 7 eighty feet; east on land of Nathaniel Fuller, eighty feet; south on a passage way, twenty feet wide, forever to be kept open, eighty feet; with the privilege of crossing Nathaniel Fuller's land on said passage way, as was deeded to us by Joseph and Daniel Fuller April 13th 1847, recorded" with Essex deeds; "also such rights on the beach lying directly between the eighty feet passage way above mentioned and the sea, as were deeded to us by said Joseph and Daniel Fuller." On the 1st of September 1848 Collins conveyed by a like description to James Harding, who on the 14th of November 1855 conveyed to Samuel A. Stone, (whose title the defendant had,) lots 7 and 8, describing them as bounded "southeasterly on a passage way eighty feet, and southwesterly on" King Street, and as "subject to the rights and reservations, and entitled to the privileges, mentioned in a

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deed from Joseph and Daniel Fuller to N. D. Chase and George Foster, recorded" as aforesaid, "and a deed of lot No. 8 from William Collins to said Harding, recorded" in like manner, "to which several deeds reference for further particulars may be had."

The plaintiff claimed title under a deed from Chase and Foster to him, dated June 13th 1853, conveying a certain piece of beach, bounded "southwest on King Street, running southeast to the sea; thence southeast on the sea, running northeast eighty feet, to beach formerly owned by Daniel and Joseph Fuller; thence northeast by said beach, running northwest, to a passage way twenty feet wide lying between said beach and land sold by us to William Collins; thence northwest on said passage way, running southwest eighty feet to point first started from on King Street;" "said beach being subject, however, to the travel from King Street and Lewis Street over it, and all the privileges and rights heretofore deeded away."

The deed of Chase and Foster to Collins was not recorded until after this suit was brought, but it is the same one referred to in the deed from them to the plaintiff.

I. Brown, for the plaintiff.

J. A. Gillis, for the defendant.

By the Court. The deed of Chase and Foster to Collins embraced the whole beach under the second description — "also such rights on the beach lying directly between the eighty feet passage way above mentioned and the sea as were deeded to us by said Joseph and Daniel Fuller." This came by various mesne conveyances to the defendant. Chase and Foster's deed to Collins was not recorded until after the deed to the plaintiff, but that deed was made subject to "all the privileges and rights heretofore deeded away." Thus the plaintiff took subject to the unrecorded deed. The defendant has the better title.

Judgment for the defendant.

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ALEXANDER McGREGOR *vs.* WILLIAM WAIT & others.

Admissions, made by a wife without her husband's knowledge, are not competent evidence of a way by prescription over land owned by them in her right.

Admissions of a son, residing with his parents and managing their estate, are not competent evidence against them of a right of way over it, without proof of the extent of his agency.

The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is no evidence against his remainderman.

A deed, under which a party to a suit claims title, being admitted by him on cross-examination to be in his possession, may be ordered to be produced and put in evidence, without calling the attesting witness.

ACTION OF TORT for breaking and entering the plaintiff's close in Ipswich, tearing down a wall and treading down the grass. Answer, a right of way over the premises from land adjoining.

At the trial in the court of common pleas, before *Bishop*, J., it appeared in evidence that the close described, with a dwelling-house thereon, was conveyed by Aaron Goodhue to Mary Hobbs, wife of Abraham Hobbs, in her own right, in 1816; and was occupied by her and her husband until 1847, when they conveyed it to the plaintiff; and that the defendants inherited from their mother, Betsey Wait, the land adjoining, with a dwelling-house thereon.

The defendants offered to introduce evidence that about 1817 or 1818 Mrs. Hobbs, while living with her husband upon the premises, came to Mrs. Wait, after the death of her husband, and asked leave to move a small shop upon a part of the space over which the defendants claimed a right of way; that Mrs. Wait gave her permission to do so, stating at the same time that, as there would be room enough left for teams to pass, she had no objection; and that the building was put there, and had remained there ever since. But there was no offer to show that Mr. Hobbs had any notice of such request.

The defendants also offered to prove that a son of Mr. and Mrs. Hobbs, while the principal agent of the estate, upon which his father and mother then lived, asked permission of Mrs. Wait, after the death of her husband, to put some fag-

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ots upon the place over which the defendants claimed a right of way; and received permission from her to do so, upon the understanding that the fagots should remain there for a short time only. The judge excluded all the above evidence.

Evidence was introduced by the defendants, that the passage through which they claimed a right of way had been known as the "gangway;" and Hannah Wait, one of the defendants, was permitted to testify that about forty years ago Abraham Hobbs placed a fence across this way, and Aaron Goodhue and some old men, neighbors of the parties, came, at the request of Mrs. Wait's husband, with him, to the place where said fence was erected; and "Goodhue asked Hobbs what he was up to; Hobbs replied that he was 'fencing up his well'; Goodhue then said, 'Mr. Hobbs, I have given you a privilege to the well and the gangway, to use the gangway peaceably with the other family,' and turned to the neighbors who were present, and asked them if they ever knew a fence to be placed where this one was erected; to which they replied in the negative; that stakes were then placed for a certain distance along the side of what the defendants claimed to be their way; that Hobbs was present during the whole interview, and made no reply to what was said, and no other remark than the one above stated, and that two or three days afterwards the fence was taken away."

The judge excluded this evidence of conversations; but permitted the evidence to go to the jury that stakes were driven down in a certain place described by the witness, and that a fence was built, and shortly afterwards taken down.

William Wait, one of the defendants, being examined as a witness in their behalf, and asked upon cross-examination whether he had in his possession any deed through which he claimed title, answered that it was in the possession of his counsel. The court then ordered the counsel to give the deed to this witness, and allowed it to be read in evidence, notwithstanding an objection that it must first be proved by the subscribing witness.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

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J. A. Gillis, for the defendants. 1. Evidence of the request made by Mrs. Hobbs to Mrs. Wait should have been admitted, as the admission of a grantor of the plaintiff. A right by prescription proceeding on the presumption of a grant, it was not necessary to presume a grant from Hobbs and wife; it might have been made by their grantor; and although Mrs. Hobbs could not make a grant without her husband, she could admit the existence of a prior grant. *Gayetty* v. *Bethune*, 14 Mass. 49.

2. The request made by George Hobbs was admissible as a declaration of his parents, he being their agent in the management of the estate.

3. The statements of Goodhue were admissible, having been made upon the land in the presence of Hobbs, and in disparagement of Hobbs's title. *West Cambridge* v. *Lexington*, 2 Pick. 536. *Doe* v. *Pettett*, 5 B. & Ald. 223. *Hyde* v. *County of Middlesex*, 2 Gray, 267. Hobbs's silence, when remarks were made in his presence which called for a reply, may be used as an admission. *Commonwealth* v. *Call*, 21 Pick. 515. *Boston & Worcester Railroad* v. *Dana*, 1 Gray, 83. *Commonwealth* v. *Harvey*, 1 Gray, 487.

4. The order to the defendants' counsel to produce the deed, without due notice previously given, was erroneous.

O. P. Lord & S. B. Ives, Jr., for the plaintiff.

METCALF, J. 1. We are of opinion that the judge rightly declined to admit evidence that Mrs. Hobbs, without her husband's knowledge, applied to Mrs. Wait for leave to put a shop on a part of the ground over which the defendants claim a right of way. That evidence was offered for the purpose of proving a right of way over land owned in fee by Mrs. Hobbs, and of which her husband and herself were seised and possessed in her right. If it was admissible for this purpose, it must have been on the ground of her confessing or admitting that her land was subject to a servitude. Such a confession or admission, by her alone, would not bind either her, or her husband, or her heirs, or the plaintiff, who is the grantee of her husband and herself. It is certain that she could not have made a valid grant of a right of way. Being under coverture, she was not competent to make

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a grant which would estop either herself or her heirs. And "to say that one may, by acts in the country, by admission, by concealment or silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." *Lowell* v. *Daniels*, 2 Gray, 169.

2. Evidence of George Hobbs's application to Mrs. Wait, for leave to place fagots on the land over which a right of way is now claimed, had no legal tendency to prove such right, and was properly excluded. The nature and extent of his agency (if any) for his parents are not shown, and therefore his implied admission of a right of way cannot affect them or their grantee.

3. The statements made to Abraham Hobbs, by Goodhue and "the neighbors," are not to be taken as true, or as admitted by Hobbs, by reason of his silence. Besides, if Hobbs were held to have admitted Wait's right of way, that admission would be evidence against himself only. He was merely tenant for life, (his own life or that of his wife,) and could not affect the rights of other parties by any admission, or even by a grant, of a right of way over land so held by him. Gale & Whatley on Easements, Pt. I. *c.* 5, § 2. 3 Stark. Ev. (4th Amer. ed.) 1217, 1218. Peake Ev. (5th ed.) 318.

4. We are of opinion that William Wait was rightly required to produce the deed under which he made claim, and that it was rightly allowed to be read in evidence without calling the attesting witness. See *Jackson* v. *Allen*, 3 Stark. R. 74; *Pearce* v. *Hooper*, 3 Taunt. 60; *Doe* v. *Hemming*, 9 D. & R. 15; *Jackson* v. *Kingsley*, 17 Johns. 158.

Exceptions overruled.

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Gardner Warren *vs.* Francis Cogswell & wife.

A deed of "a certain parcel of land, situated in A., being my homestead, containing two hundred acres, being the same estate now occupied by me," does not pass four lots in the occupation of tenants at will, although included in two hundred acres in A., owned by the grantor; and cannot be contradicted by extrinsic evidence of an intent of the parties to include those lots.

Writ of entry to recover two hundred acres of land in Andover. Plea, as to four lots included in the tract sued for, nul disseisin; and a disclaimer as to the residue. Trial before *Metcalf*, J., who reported to the full court the following case:

The demandant claimed title under two mortgages to secure the payment of $20,000, made by John Marland to James L. Little and others in December 1847, and since foreclosed, of "a certain parcel of land, situated in said Andover, being the homestead of me the said John Marland, in that part of said Andover called Ballard Vale, containing two hundred acres of land, being the same estate now occupied by me." The tenant claimed title under a second mortgage, made by Marland in March 1848, which described by metes and bounds the four lots specified in the plea. At the time of making the demandant's mortgages, these four lots, with the houses and shops thereon, were owned by Marland, and occupied by tenants at will, paying rent to him; and were separated by walls and fences from the residue of the land demanded, which was used and occupied by Marland as a farm, and had his mansion house upon it. Marland owned about two hundred acres of land at Ballard Vale.

The demandant offered in evidence certain policies of insurance upon buildings on these lots, effected by Marland and assigned by him to said Little and others; and also offered to prove that the property owned by Marland at Ballard Vale was not worth more than twenty thousand dollars. But the judge ruled that this evidence was incompetent.

J. W. Emery, (*O. P. Lord* with him,) for the demandant. 1. The deed of John Marland to Little and others passed all the estate owned by Marland at Ballard Vale, at its date. All the

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land then owned by him was but two hundred acres. The word "homestead" in this country has no settled legal meaning, and must be so construed, in connection with all the words used in the description of the thing granted, as to give effect to the intent of the grantor. *Taylor* v. *Mixer*, 11 Pick. 346. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15. *Wheeler* v. *Randall*, 6 Met. 529. *Dana* v *Middlesex Bank*, 10 Met. 250. *Aldrich* v. *Gaskill*, 10 Cush. 155. The construction is to be against the grantor. *Worthington* v. *Hylyer*, 4 Mass. 205. *White* v. *Gay*, 9 N. H. 126. *Cocheco Manufacturing Co.* v. *Whittier*, 10 N. H. 305. *Jackson* v. *Blodget*, 16 Johns. 172. The word "estate" may mean the quantity of the grantor's interest in lands. *Godfrey* v. *Humphrey*, 18 Pick. 539. *Tracy* v. *Kilborn*, 3 Cush. 557. The use of the words "homestead estate," and not "farm," shows that more than his farm was intended to be conveyed. The addition of the words "being the same estate occupied by me," if repugnant, cannot alter, limit or control the preceding description. *Cutler* v. *Tufts*, 3 Pick. 272. *Cartwright* v. *Amatt*, 2 Bos. & Pul. 43. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 28. *Eliot* v. *Thacher*, 2 Met. 44, note. *Wheeler* v. *Randall*, 6 Met. 529. *Sawyer* v. *Kendall*, 10 Cush. 241. *Hibbard* v. *Hurlburt*, 10 Verm. 173. In *Brown* v. *Saltonstall*, 3 Met. 425, the words were not "estate occupied," but "house and land occupied;" and were used in a devise, which must be construed, if possible, so as not to disinherit the heir. *Denn* v. *Gaskin*, Cowp. 661.

2. If upon the case stated a doubt is raised as to the meaning of the description, evidence of the contemporaneous acts of the parties, and of the value of the whole property, is admissible to remove the doubt. *Stone* v. *Clark*, 1 Met. 381. *Codman* v. *Winslow*, 10 Mass. 149. Broom's Max. (2d ed.) 473. *Derby* v. *Hall*, 2 Gray, 243. *Morgan* v. *Moore*, 3 Gray, 322.

J. W. Perry, for the tenants. 1. The four lots in question did not pass under the description "homestead," which means "chief seat," "mansion house," "place of the house," or "house place." "Homestead farm" has a broader signification, but does not necessarily include all the parcels of land owned by

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the grantor, though lying and occupied together. 1 Bouvier's Law Dict. Homestead. *Woodman* v. *Lane*, 7 N. H. 245. *Taylor* v. *Mixter*, 11 Pick. 347. *Aldrich* v. *Gaskill*, 10 Cush. 158. Words of quantity are controlled by the other certain words of description. *Bacon* v. *Leonard*, 4 Pick. 277. *Aldrich* v. *Gaskill*, 10 Cush. 155. *Woodman* v. *Lane*, 7 N. H. 241, & cases cited. *Allen* v. *Allen*, 14 Maine, 387. *Jackson* v. *Barringer*, 15 Johns. 471. The words "now occupied by me" define and limit the former words; and "occupied" has received a judicial construction that excludes these four lots from this description. *Brown* v. *Saltonstall*, 3 Met. 425. *Doe* v. *Parkin*, 5 Taunt. 321. *Marshall* v. *Pierce*, 12 N. H. 128. *Allen* v. *Allen*, 14 Maine, 387.

2. The evidence offered by the demandant was incompetent. It had no tendency to explain the meaning of the words "homestead" and "occupied." *Brown* v. *Saltonstall*, 3 Met. 425, & cases cited. *Tucker* v. *Seaman's Aid Society*, 7 Met. 209. *Norton* v. *Webster*, 12 Ad. & El. 442.

By the Court. 1. The four lots not in the grantor's occupation were not embraced in the term "homestead," and did not pass by the mortgages to Little and others. *Brown* v. *Saltonstall*, 3 Met. 413.

2. The evidence offered and excluded was inadmissible to affect the construction of the deed. *Judgment for the tenants.*

John C. Phillips *vs.* Frederic Tudor.
Thomas W. Phillips *vs.* Same.

A deed by a tenant in common of "sixty four rods, being part of" the lot held in common, passes no title in common; nor in severalty, without possession taken under it of the part claimed.

Actions of tort for breaking and entering the closes of the plaintiffs in Nahant and removing a wall.

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The actions were tried together in the court of common pleas, when it appeared by the plaintiffs' evidence that they occupied two adjoining lots of land, with dwelling-houses thereon, westerly of the road leading over Bass Neck, upon both of which lots was an old wall, a short distance from the road and nearly parallel to it; and that in May 1855 the plaintiffs moved this wall out upon the line of the road, and in October 1855 the defendant moved the wall back to its original position.

The plaintiffs claimed that the land between the old wall and the road, upon which the alleged trespasses were committed, was part of the lot laid out to Moses Hudson in the division of common lands at Nahant by commissioners in 1706, the deeds of which they held.

The defendant claimed that this land was part of the lot laid out to Robert Potter, by the same division, next eastwardly of the lot laid out to Moses Hudson, and that the old wall was the boundary between the lots of Hudson and Potter.

The defendant also claimed an interest in the Robert Potter lot, as tenant in common, and a right to remove the wall from the Robert Potter lot, where it was placed by the plaintiffs, back to the boundary between the Hudson and Potter lots.

The Potter lot was in the common pasture, and had never been inclosed; and all the lands at Nahant, not inclosed, have always been used as a common pasture by the owners of the lots laid out in 1706; each owner having a right in the general pasture in proportion to the land he held uninclosed. Before May 1855 the common pasture extended over the land between the old wall and the road, which is a town way running through the common pasture.

The plaintiffs showed no interest in the Potter lot, and there was no evidence of any division or partition of that lot.

The defendant put in evidence a deed of quitclaim, dated March 14th 1839, from John Stone and others to Samuel Tufts, of "a certain undivided fifth part of a lot of land, said lot in the whole containing about two and a half acres, our part of the same being about one half of an acre, undivided; said lot is situate on Nahant, being a part of the third lot in the fourth

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range;" also a deed, dated March 26th 1847, from Tufts to the defendant of "sixty four rods; being part of the third lot in same range, laid out to Robert Potter."

The Potter lot contained nearly two acres, and it was admitted by the defendant upon examination of the title, that the interest of Tufts in that lot was but thirty one and three fifths rods, and that the land between the old wall and the road contained more than that.

The plaintiffs objected that by the deed of Tufts to the defendant the defendant took an interest in severalty in the Potter lot, and not in common, and had no right to enter upon any part of the Potter lot, except upon what he held in severalty; and as there was no evidence of his holding in severalty any part of the land between the road and the old wall, that he had no right to remove the wall, even if the plaintiffs had no title. And *Mellen*, C. J. ruled, that under the deed of Tufts the defendant could not justify entering and removing the wall; and ordered verdicts for the plaintiffs, which were returned, and the defendant alleged exceptions.

W. C. Endicott, for the defendant. Where a grantor, seised of a certain parcel of land, conveys a moiety or part of the same, without words of limitation or assignment in severalty, the grantee takes as tenant in common. Lit. § 299. Co. Lit. 190 *b*. *Webster* v. *Atkinson*, 4 N. H. 24. *Adams* v. *Frothingham*, 3 Mass. 362. The words "sixty four rods" merely explain the amount of the "part" conveyed, but do not indicate any assignment or limitation in severalty. It can make no difference whether a deed states the number of rods of land in the part, or states the fractional part.

Upon the same principle, if the grantor, instead of being seised of the whole parcel, is a tenant in common in the whole, and conveys a part or moiety, being his whole interest, without words of limitation or assignment in severalty, then the grantee takes as tenant in common. Under the deed from Stone and others, Tufts was seised as tenant in common of thirty one and three fifths rods (that being found upon examination of title to be all that they held) in the Potter lot. It is not to be pre-

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sumed, in the absence of express words, that Tufts intended to convey an estate in severalty in any particular portion of the lot, for he did not own the whole; nor that he intended to create another estate in common, in a particular portion, within the general estate in common, unless he clearly so describes it, by naming the boundaries, or in some way designating its position, it having been in common pasture and undivided.

Where a grantor conveys a certain number of acres in a large tract, to be selected by the grantee, the grantee takes as tenant in common. Co. Lit. 48 *b*. 4 Cruise Dig. tit. 32, *c*. 21, § 44. *Jackson* v. *Livingston*, 7 Wend. 136.

It is conceded that a deed by a tenant in common of a specific portion of the lands held in common is void as to the other cotenants, the unity of possession being destroyed. *Porter* v. *Hill*, 9 Mass. 34. *Bartlet* v. *Harlow*, 12 Mass. 348. *Peabody* v. *Minot*, 24 Pick. 329. *Mitchell* v. *Hazen*, 4 Conn. 495. *Hinman* v. *Leavenworth*, 2 Conn. 244 note. But in all those cases the land was conveyed by metes and bounds; and such a deed has never been decided to be a conveyance in severalty without metes and bounds, or something equivalent. The word "undivided" is not necessary to create a tenancy in common; and the fact that no particular estate in severalty is described shows that the estate is conveyed in common and not in severalty.

Words in a deed operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. Bac. Ab. Grant, I, 1. *Osman* v. *Sheafe*, 3 Lev. 372. *Goodtitle* v. *Bailey*, Cowp. 600. By holding this deed to create a tenancy in common the rights of the cotenants are not impaired, the intent of the parties is carried out, and nobody is affected, except one taking the land without title.

G. W. Phillips & O. P. Lord, for the plaintiffs, cited *Webster* v. *Atkinson*, 4 N. H. 21; *Canning* v. *Pinkham*, 1 N. H. 353; *Great Falls Co.* v. *Worster*, 15 N. H. 423, 454; *Adams* v. *Frothingham*, 3 Mass. 353; *Bean* v. *Thompson*, 19 N. H. 290; *Haven* v. *Cram*, 1 N. H. 93; *Longworth* v. *Bank of United States*, Wright, 51; *Walsh* v. *Ringer*, 2 Ohio, 327; *Turney* v. *Yeoman*,

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16 Ohio, 24; *Ronkendorff* v. *Taylor*, 4 Pet. 362; *Cameron* v. *Irwin*, 5 Hill, 275; *Enfield* v. *Permit*, 5 N. H. 280; *Parkhurst* v. *Smith*, Willes, 332.

Bigelow, J. The deed of Samuel Tufts, under which the defendant claimed title and justified the act of trespass alleged in the declaration, cannot be construed to convey an estate in common and undivided with the other owners of the Robert Potter lot. There is nothing to indicate that the grantor intended to convey an undivided interest in the whole lot. On the contrary, it does not purport to convey the whole interest of the grantor, nor an undivided interest in the entire tract. It is only a grant of sixty four rods, parcel of a larger lot. He owned a certain portion or fraction of the whole lot. This he does not grant, but he conveys sixty four rods, and describes it as part of a lot, in the whole of which he was the owner of an undivided interest. The deed does not come within that class of cases where the owner of an entire tract conveys a certain part of the whole. In such cases there is no difficulty in construing the conveyance as a grant of an undivided interest in the proportion which the quantity granted bears to the whole parcel.

What was then the effect of the deed? A conveyance in severalty of sixty four rods in a close containing a larger quantity and owned in common with others, without boundaries or other means to designate or fix the location of the land intended to be granted, if valid as against all persons except other owners in common of the whole close, cannot take effect until the grantee has entered and taken possession of the quantity of land conveyed by the deed, and thus made certain the part of the close which he claims to hold in severalty under his grant. Until such entry and possession, it is wholly uncertain what part of the close is comprehended within the grant, and the deed cannot take effect as to any specific part. There was no proof of any such entry in the present case upon the land where the trespass was committed. The defendant had no title to enter as a tenant in common, and he proved no entry upon any portion of the land to hold in severalty. *Exceptions overruled.*

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William Williams *vs.* Abigail Nichols.

A promissory note, given by a widow to a creditor of her deceased husband for the amount of his debt, is void for want of consideration, if the husband has left no estate or assets, though the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate by the note.

Action of contract upon a promissory note, made by the defendant, a widow, on the 5th of September 1854, to the plaintiff, for the amount of his bill for attendance as a physician at the last illness of William Nichols, the defendant's husband, who died July 17th 1853. At the time of receiving this note the plaintiff gave the defendant a receipted bill acknowledging payment from the estate of his demand, by this note.

After proof of the above facts at the trial in the court of common pleas, the defendant offered to show that "William Nichols left no estate or assets, out of which this debt could have been paid, or the defendant remunerated for incurring this liability." But *Mellen*, C. J. rejected such evidence as immaterial, and ruled that the facts disclosed sufficient consideration for the note in suit; and under the instructions of the court the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

T. M. Stimpson, for the defendant, cited *Packard* v. *Richardson*, 17 Mass. 139; *Hill* v. *Buckminster*, 5 Pick. 391; *Parish* v. *Stone*, 14 Pick. 198; Chit. Con. (8th Amer. ed.) 29; *Dearborn* v. *Bowman*, 3 Met. 155, & cases cited; *Jones* v. *Ashburnham*, 4 East, 463.

O. P. Lord, for the plaintiff. A consideration, in order to support a promise, need not necessarily be beneficial to the promisor. It is sufficient if any privilege or advantage goes from the other party, or he suffers any damage, trouble or prejudice, or the promise is the inducement to the transaction. *Forster* v. *Fuller*, 6 Mass. 68. *Amherst Academy* v. *Cowls*, 6 Pick. 427.

The defendant, rather than take out administration upon her husband's estate, voluntarily chose to pay the debt against the estate by her own note. The giving up of a receipted bill for

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his services by the plaintiff was a sufficient consideration to support the note. It was immaterial whether or not the estate was insolvent. She, having considered his receipted bill, which was in the nature of an assignment of the debt to her, worth her promissory note, is now estopped to prove that it was of no value. Indeed, the giving up by the plaintiff of the right of administration (to which he was entitled by the delay of the widow for more than a year to take out administration) was of itself a sufficient consideration.

Dewey, J. This case presents the naked question of a legal consideration for the note sought to be recovered. The facts offered to be shown by the evidence were that the husband, who was the original debtor, had died, leaving no estate real or personal liable to the payment of his debts, or the subject of distribution among his heirs, or which might be applied by way of an allowance to his widow in any form. The case stated is that of one dying without leaving anything to pass to anybody for any purpose, or in any form whatsoever. Whether this fact can be shown may be a subject of inquiry hereafter; but, as regards the legal question now before us, we must take the case to have been that of a widow who, at the solicitation of a creditor of her deceased husband, gives to him a promissory note promising to pay him the amount of his debt due from her husband, in a case where there are no assets to be administered, and where no possible benefit can result to the party giving such note, and no possible damage is suffered by the payee.

In the case supposed, the widow would derive no benefit from the discharge of a debt due by her deceased husband. Nor do we perceive how any possible damage to such creditor could arise from having given a receipt to the widow purporting to discharge such demand. The giving of the receipt would not, under the circumstances here offered to be shown, establish a legal consideration for the note. In the opinion of the court, upon the facts offered, if shown to exist, the case would be that of a voluntary promise, not founded on any legal consideration.

Exceptions sustained.

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John Gustin *vs.* Inhabitants of School District Number Five in Danvers.

Any subdivision of one school district which has been altered within ten years is within the prohibition of *St.* 1849, *c.* 206, that "no town shall be districted anew for school purposes, so as to change the taxation of lands of proprietors into districts using different school-houses, oftener than once in ten years."

Action of contract to recover back money assessed on the plaintiff for the building of a school-house and paid by him under protest. The case was submitted to the judgment of the court upon these facts:

At a meeting on the 7th of April 1856, the town of Danvers voted to alter the lines of several of the school districts, and among them of District No. 5, which lost seven scholars by the alteration. At a meeting on the 23d of June 1856, the town voted to divide District No. 5 into two districts, one to be called No. 5 and the other No. 8, which last contained no part of what had been added to District No. 5 by the vote of April 7th. The inhabitants of District No. 5 afterwards voted to build a new school-house, and, in order to raise money for that purpose, assessed the tax in question on the inhabitants of so much of the district as had not been set off as District No. 8.

O. P. Lord, for the plaintiff.

S. B. Ives, Jr. & J. B. Peabody, for the defendants. The *St.* of 1849, *c.* 206, only provides that "no town shall be districted anew for school purposes, so as to change the taxation of lands of proprietors into districts using different school-houses, oftener than once in ten years." It prohibits a redistricting of the whole town; not the subdivision of one district. It applies only to such a districting anew "as to change the taxation of proprietors into districts using different school-houses;" not to this case, in which it is agreed that the second vote did not affect any land which had been affected by the first.

Dewey, J. The decision of the present case depends upon the construction to be given to the *St.* of 1849, *c.* 206. That a

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change of the territorial limits of School District No. 5 in Danvers, and one that somewhat affected the rate of taxation of lands in the district, was made by the town by their vote of June 23d 1856, is conceded in the facts stated by the parties. The present tax was voted and assessed in reference to the school district as constituted by that vote. Was this change in District No. 5 in violation of the statute above cited?

The defendants insist that this statute only forbids the redistricting of the whole town, and not a change in a portion of the school districts. We cannot adopt that construction, but suppose it to be intended to protect the inhabitants of a town from too frequent or double taxation for building school-houses, and other expenses incident to a change in the territorial limits of school districts. The evil apparently intended to be remedied by the statute might equally arise from a change in a portion of the districts as from a change made in all.

The language of this statute is somewhat obscure, and objection might be taken to the use of the words, "so as to change the taxation of the lands of *proprietors*," as the most appropriate words to express the real estate of the inhabitants of the district. But the same form of expression is adopted in the additional statute of 1851, *c.* 303, which has strongly confirmed us in the opinion that the first named act was intended to restrain towns from changing the territorial limits of school districts, in such manner as to affect taxation of real estate, oftener than once in ten years. The additional act gave a full opportunity to each town once to make any changes in the districts within ten years after the passage of the first act, and was enacted to secure that object. This seems to assume as the construction of the original act a restriction of the alterations to the period of ten years, and provide that no change in the districts before the act of 1849 shall debar the town from redistricting once after the passage of that act.

The town of Danvers had made changes in their school districts, and redistricted the town by their vote of April 7th 1856. This under these statutes had exhausted their powers; and the vote of June 23d 1856, making further changes in the district

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was unauthorized, and a tax voted and assessed upon School District No. 5, as constituted by this latter vote, was an illegal assessment, and the plaintiff is entitled to recover the money he has paid in discharge of the tax assessed and collected of him.

Judgment for the plaintiff.

SUSAN C. CRAM *vs.* JAMES W. BAILEY & another.

The owner of property, by joining in a mortgage of it from another person, does not estop himself to assert his title as against any one but the mortgagee; and, in an action of trespass against an officer attaching it as the property of that person, may recover the full value of the property, notwithstanding a settlement made between the attaching creditor and the mortgagee without the mortgagor's assent.

ACTION OF TORT against a deputy sheriff and his assistant, for taking and carrying away personal property. The defendants denied that it was the property of the plaintiff, and justified under a writ of attachment against Maria A. Cram.

At the trial in the court of common pleas before *Briggs*, J., it appeared that by a mortgage, dated December 6th 1854, made by said Maria, and signed also by the plaintiff, and duly recorded, this and other property were conveyed to Ebenezer B. Chase, to secure the payment, in sixty days from date, of fifty dollars due him from said Maria, the plaintiff's daughter, with whom she lived, and in whose house the property was; and that Chase, when he received the mortgage, and the defendants, when they took this property, knew that it was the plaintiff's.

The defendants requested the judge to instruct the jury that the mortgage of this property by the daughter, assented to in writing by the plaintiff, and recorded, rendered the property liable to attachment as the daughter's, and estopped the mother to maintain this action. But the judge refused.

The defendants also contended that the plaintiff could at most recover only the value of the right of redeeming the property from the mortgage; and that the jury, in assessing dam-

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ages, should deduct the amount of the mortgage debt. But the judge ruled that the plaintiff was entitled to recover if anything the full value of the property.

The defendants, in mitigation of damages, also offered in evidence an agreement signed by Chase, by which, in consideration of having received from the defendant Bailey $25, the proceeds of a part of the property mortgaged and attached as aforesaid, he released said defendant and the attaching creditors from all claim for damages on account of that part of the property. But the judge rejected the evidence as incompetent and immaterial.

The jury found for the plaintiff, and the defendants excepted.

R. Cross, for the defendants.

D. Saunders, Jr., for the plaintiff.

By the Court. 1. The plaintiff's right in her property was not devested or changed, as against strangers, by reason of her having mortgaged it for her daughter's debt. As against all persons but the mortgagee and those claiming under him, she had the right of property and of possession, and can maintain this action.

2. The measure of damages to the plaintiff was the value of the property at the time when it was taken. The fact that a third person had a claim upon it did not diminish the plaintiff's claim for damages. *Ullman* v. *Barnard*, 7 Gray, 558.

3. The settlement made by the attaching creditors with the mortgagee, without the plaintiff's knowledge or consent, did not affect the plaintiff's claim for damages. It did not appear but that the daughter would pay the whole of her debt.

Exceptions overruled.

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Joseph P. Hardy *vs.* Daniel Potter.

The Rev. Sts. c. 28, § 154, requiring lumber to be surveyed before sale, do not apply to a sale in another state of lumber in this commonwealth.

Testimony of a purchaser of lumber that he bought and paid for it in another state, the lumber being then in the custody of an agent of the seller in this state, to whom the seller promised to write; that nothing more was to be done between the seller and himself in relation to the sale; and that he afterwards saw it here; is sufficient evidence of a delivery to be submitted to the jury.

Action of tort for the conversion of lumber. Answer, that the defendant took it on mesne process against John Adams in January 1856; and that any previous sale of it by Adams to the plaintiff was void, because fraudulent, and because the lumber had not been previously surveyed as required by law.

At the trial in the court of common pleas before *Mellen*, C. J., the plaintiff testified that he bought the lumber from Adams at Frankfort, Maine, in October 1855, and took two bills of sale of it, and paid for it by his promissory notes; that the lumber was then lying on certain wharves in Beverly in this county, in the custody of John H. Cross, an agent of Adams, and to whom Adams promised to write; that nothing more was to be done between himself and Adams in relation to the sale; that the lumber was bought by the marks of the survey made in Maine, and was not surveyed in Massachusetts before its attachment by the defendant; and that in the fall of 1855 he saw it in Beverly. The plaintiff offered no further evidence of delivery, but rested his case.

The defendant asked the presiding judge to rule, "that the plaintiff could not maintain his action, because,

"1st. It did not appear by the evidence introduced by the plaintiff that there was any such delivery as would perfect the sale from Adams to the plaintiff.

"2d. It appeared from the evidence that the sale, if any there was, was in violation of the provisions of the Rev. Sts. *c.* 28, § 154, and was therefore void."

The presiding judge refused so to rule; but ruled, and subse-

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quently instructed the jury, "that if nothing more remained to be done between the parties, and if the plaintiff prior to the attachment had been to Beverly, to the place where the lumber was, and had exercised acts of ownership over it by virtue of his purchase, and treated it as his property, that would constitute a delivery of it;" and "that if the contract was executed, and the possession of the property had passed to the plaintiff, and he was holding under that purchase when it was attached by the defendant, it was not a matter that would avoid the contract that there had been no survey of the lumber in this state before such attachment, or before the delivery of the lumber to the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. A. Gillis, for the defendant.

O. P. Lord, for the plaintiff.

Merrick, J. The plaintiff claims the lumber under two bills of sale thereof from John Adams. The contract of sale was made and completed in the State of Maine, where the vendor and vendee then both were; but the lumber thus sold was then lying on a wharf in Beverly in this state. It does not appear, and it has not been suggested, that the contract of sale was in contravention of, or invalid under, the laws of the State of Maine. It cannot be affected by the provisions of the statute of this commonwealth, Rev. Sts. *c.* 28, § 154, which has no extraterritorial operation. And being legal and valid by the laws of the state where the contract was made, the bills of sale made for a good and valuable consideration transferred the property to the plaintiff from Adams, and the sale was thereupon effectual against him, and against all other persons, except subsequent *bona fide* purchasers and attaching creditors, who should obtain possession thereof before there was any delivery to or possession taken by the plaintiff of the same.

Whether there was any such delivery or possession taken by the plaintiff of the lumber before it was attached by the defendant was submitted to the jury upon proper and correct instructions; and their verdict is decisive upon that question.

Exceptions overruled.

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EZRA B. WELCH & others *vs.* WASHINGTON MERRILL.

In an action for the price of goods delivered to a third person on the alleged credit of the defendant, the plaintiff cannot give in evidence his previous direction to his servant to refuse a further credit to that person.

ACTION OF CONTRACT for the price of meat delivered to Michael Comody on the credit of the defendant.

At the trial in the court of common pleas, before *Bishop*, J., Amos Bailey testified that while in the employ of the plaintiffs in 1853 he sold meat to Comody a few times, and was then directed by the plaintiffs not to trust him; that on the 4th of July the defendant asked him to let Comody have meat and that he would see that it was paid for; that he subsequently furnished meat to Comody on the expectation that the defendant would pay for it; that Comody never paid him anything after said 4th of July, and that he had never called on Comody for pay.

Daniel Morse, one of the plaintiffs, testified that Comody had meat till the 4th of July; that he made out Comody's bill till the 1st of July and sent it over by Bailey. The plaintiffs then asked what directions the witness gave Bailey. To this the defendant objected. But the objection was overruled; and the witness answered that he directed Bailey not to let Comody have any more meat if he did not pay that bill. The witness then further testified that subsequently he had an interview with the defendant, who requested him to let Comody have meat and he would see the witness paid; that he let Comody have the meat, expecting the defendant to pay for it; and that he did not call on Comody to pay for any meat furnished after the 4th of July The verdict being for the plaintiffs, the defendant excepted.

N. W. Harmon, for the defendant.

N. S. Howe, for the plaintiffs.

BIGELOW, J. The testimony of one of the plaintiffs as to the direction given to his servant to refuse a further credit to the person to whom the meat was furnished was incompetent. It

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was *res inter alios*, and had no legitimate bearing on the issue before the jury. The question was not as to the direction given by the plaintiff to his servant concerning the credit, but to whom was the credit actually given. A similar point was raised in *Nutting* v. *Page*, 4 Gray, 584, and it was there held that such evidence was inadmissible. *Exceptions sustained.*

JOHN M. ANDERSON & another *vs.* INCREASE H. BROWN.

Under Rev. Sts. *c.* 99, § 19, a review may be granted by the court of common pleas of a judgment of that court, affirming a judgment of a justice of the peace on the complaint of the defendant in review.

On a writ of review of a judgment of the court of common pleas, affirming, on complaint of the defendant in review, a judgment of a justice of the peace, from which an appeal had been taken by the plaintiff in review, but not entered, the case must be tried on its merits, as if an appeal had been duly entered.

In a writ of review of a judgment of the court of common pleas, an omission to allege that the judgment was rendered on complaint of the defendant in review in affirmance of a judgment of a justice of the peace is no variance.

WRIT OF REVIEW, granted by the court of common pleas, of a judgment described in the declaration as rendered by that court in favor of the defendant in review against the plaintiff in review in an action of tort. Trial in the court of common pleas before *Perkins*, J., to whose rulings, stated below, the defendant in review alleged exceptions.

The judgment sought to be reviewed was in fact rendered by that court, upon complaint of the defendant in review, in affirmance of a judgment of a justice of the peace, in an action of tort brought by the plaintiffs in review against the defendants in review, from which the plaintiffs in review had taken an appeal which they had neglected to enter. This appearing by certified copies of the proceedings before the justice, of said complaint to the court of common pleas and of the judgment thereon, as produced and filed in court by the plaintiffs in review; the defendant demurred to the writ and declaration, upon

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the ground that a writ of review did not lie in such case. But the judge overruled the demurrer.

The defendant in review then proved the facts above stated, and the granting of this writ of review by the court of common pleas on petition; and rested his case; and asked the court to rule that the merits of the original action tried before the justice were not open in this action, and that he had therefore made out his case, and the judgment of the court of common pleas should be affirmed. But the judge refused so to rule, and ruled that the defendant in review must go into the merits of the original action to make out a case for affirmation of the judgment.

The defendant also contended that there was a variance between the declaration and the proof, because the declaration did not show that the judgment of the court of common pleas was rendered on the complaint of the defendant praying for an affirmation of the judgment of the justice of the peace. But the judge overruled the objection, and a verdict was taken for the plaintiffs in review, subject to exceptions.

J. H. Robinson, for the defendant in review.

J. A. Gillis, for the plaintiffs in review.

Dewey, J. That a writ of review may properly be allowed to be brought to reverse a judgment of the court of common pleas rendered upon the complaint of the defendant in review, praying for the affirmation of a judgment of a justice of the peace, seems fully settled by the analogous case of *Bowditch Mutual Fire Ins. Co.* v. *Winslow*, 3 Gray, 415. The language of the Rev. Sts. *c.* 99, § 19, clearly embraces a case of this kind.

When such review is allowed, and the writ properly issued, the case is open to be tried upon its merits, as in other cases of writs of review. It was therefore the duty of the plaintiff in the original action, on the trial of the writ of review, to produce the proper evidence to substantiate his claim, in the same manner as would have been required, had the appeal been duly entered and no proceedings taken place or complaint been filed for affirmation of the judgment of the justice of the peace. The judgment of the justice was no longer a valid judgment,

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because an appeal had been duly taken therefrom. The judgment of the court of common pleas, affirming that judgment on a complaint, had been opened by the granting of a writ of review. The defendant in error could not therefore properly rest his case upon any former judgment, but must present proper proofs to maintain his claim. The court of common pleas therefore properly ruled that the evidence introduced by the defendant in error did not entitle him to a judgment in his favor.

We perceive no ground for sustaining the position of the defendant in error, that judgment should have been rendered in his favor on account of a variance in the recital of the writ of review as to the nature of the judgment sought to be set aside by the writ of review. *Exceptions overruled*

Benjamin B. Fuller *vs.* Salem and Danvers Loan and Fund Association.

Under a by-law of a loan and fund association, providing that "in case any member by reason of sickness or removal, or through misfortune, is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association; and in case the directors are satisfied as to the grounds of withdrawal, his whole amount of subscription shall be returned except the entrance fee;" and that "any person wishing to withdraw for the above reasons or otherwise," and who shall have been a member for a certain time, "and be clear of the books," shall be entitled to a certain interest on that amount; any person having been a member for that time, and "clear of the books," may withdraw without leave of the directors.

The *St.* of 1854, c. 454, § 8, conferring on this court jurisdiction in equity of all disputes between loan and fund associations and their members does not affect the right of any member to sue the association at law.

Action of contract against a loan and fund association, incorporated under *St.* 1854, *c.* 454, to recover back the amount of the plaintiff's subscription.

The parties submitted the case to the judgment of the court upon the following facts: "The plaintiff at the date of the writ had been a member of the association for two years and more,

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and was 'clear of the books;' and, a month or two before the action was commenced, gave a written notice to the secretary of the association of his desire to withdraw from the association, which notice was communicated to the board of directors; but the directors refused to permit the plaintiff to withdraw, because they were not satisfied with the grounds of withdrawal, and upon demand refused to pay the plaintiff the amount of his subscription and interest." The defendants' "articles of association" or by-laws were made part of the case. The only one that bears upon it is copied in the margin.*

J. W. Kimball, for the plaintiff.

J. A. Gillis, for the defendants.

DEWEY, J. The twentieth of the "articles of association" of the defendants clearly contemplates the case of a withdrawal of shares from the common fund under certain contingencies.

In addition to the provision for refunding to the widow or next of kin of a deceased member, a further provision is made for withdrawal by a living member, who "by reason of sickness or removal, or through misfortune, is unable to continue

* ARTICLE XX. *Withdrawal of Shares.* In case of the death of any member, the amount paid into the society shall be refunded to his widow or next of kin, or shall belong to his executors or administrators, who shall enjoy the same benefits and advantages and be subject to the same liabilities as the original holder enjoyed or was subject to; provided the same be claimed during the existence of the association, but if not, shall be forfeited to the association. When there is more than one executor or administrator, the first named only in the letters testamentary, or of administration, shall vote at the meetings of the association. And in case any member by reason of sickness or removal, or through misfortune, is unable to continue the payment of his subscription to the society, he or she may give notice to the secretary of an intention to withdraw from the association; and in case the board of directors are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned, with the exception of the entrance fee. Any person wishing to withdraw, for the above reasons or otherwise, and who shall have been a member of the association two years, and be clear of the books, shall receive an interest of four per cent., and any member of more than three years' standing shall be entitled to an interest of five per cent., on the amount of funds paid by such member or members into the funds of the association.

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the payment of his subscription to the society; he may give notice to the secretary of an intention to withdraw from the association; and in case the board of directors are satisfied as to the grounds of the withdrawal, the whole amount of subscription paid by the party into the association shall be returned, with the exception of the entrance fee."

The case of the plaintiff is not however within this provision but, as he contends, is embraced by the further provision, that "any person wishing to withdraw, for the above reasons or otherwise, and who shall have been a member of the association two years, and be clear of the books, shall receive an interest of four per cent. on the amount of funds paid by such member into the funds of the association." It is under this clause that the claim of the plaintiff can be maintained, if at all.

The defendants insist that no member of the association has, under any circumstances or at any time, a right to withdraw without the assent of the directors. Such may have been the purpose and intent of the framers of the articles of the association. It is certainly to be regretted that so important a matter, and one that may so deeply affect the interests of the association, should not have been made entirely obvious and unquestionable. Giving the natural construction to the language actually used, the court is of opinion that the last clause has given the broad and unqualified right to withdraw from the association, in favor of any person who shall have been a member of the association two years, and be clear of the books; and that such person may, upon proper notice of his wish to withdraw, insist upon the repayment of the amount he has advanced to the association, with interest at the rate of four per cent. *per annum*. This latter provision embraces not only those persons wishing to withdraw for the reason of "being unable to continue the payment of their subscriptions by reason of sickness or removal, or through misfortune," but also persons wishing to withdraw "for the above reasons, or otherwise." We understand this latter expression to be unlimited as to the causes of wishing to withdraw from the association, and not confined to those upon which the board of directors are to be satisfied; and

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is under this view of that provision that we are of opinion that this action can be maintained.

It was further objected that by § 8 of *St.* 1854, *c.* 454, the jurisdiction over any claims or disputes arising between such corporation and its members was exclusively a jurisdiction in equity by this court. But we think that provision is only a cumulative one, leaving the parties to proceed also at common law, wherever a proper case for a common law remedy was shown. Upon the construction which we have given to the articles of association, a simple duty existed on the part of the defendants of paying over to the plaintiff the amount of his subscription to the association, with interest at the rate of four per centum. There is nothing before us to show that this is not an entirely solvent corporation, or that any cause exists for a *pro rata* distribution of assets of a fund insufficient to discharge all similar existing claims. *Judgment for the plaintiff.*

SAMUEL E. PEABODY *vs.* COUNTY COMMISSIONERS OF ESSEX.

Under the Rev. Sts. *c.* 7, § 13, and *St.* 1839, *c.* 139, § 2, ships belonging to a partnership and employed in its business are to be taxed to the partners jointly in the town where their business is carried on, and not separately at their places of residence.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners, refusing to abate a tax assessed by the city of Salem. The case was submitted to the decision of the court upon the following facts:

The petitioner resides in Salem, and is a member of the firm of Curtis & Peabody, merchants, whose place of business is in Boston; Francis Curtis, the other partner, residing in Roxbury. All the property of the partnership is invested in ships and vessels, which are registered in the names of Curtis and Peabody individually, as partowners, conformably to the laws of the United States, although the vessels are regarded and treated as

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partnership property. The partnership is taxed in Boston on its joint property. The tax in question was assessed on the petitioner's share in these vessels.

W. C. Endicott, for the petitioner. By the Rev. Sts. *c.* 7, § 9, all personal property, except in the cases enumerated in § 10, shall "be assessed to the owner in the town where he shall be an inhabitant." This applies to individuals only, who are to be taxed at their place of residence. By § 13 partners in business are to be "jointly taxed, under their partnership name, in the town where their business is carried on, for all the personal property employed in such business;" thus recognizing that, for the purposes of taxation, a partnership has a place of residence. See *Lee* v. *Templeton*, 6 Gray, 579. This, like other laws governing partnership property, treats it as a whole, without regard to the several interests of the partners.

The *St.* of 1839, *c.* 139, is in amendment of §§ 9, 10, and not of § 13, of *c.* 7 of the Rev. Sts. Section 1 of the *St.* of 1839, concerning stock in trade, enlarges the provisions of *cl.* 1 of the Rev. Sts. *c.* 7, § 10; the provision about horses in § 2 of *St.* 1839 applies to *cl.* 3 of said § 10; and the object of the provision that "all ships or vessels, at home or abroad, shall be taxed to the owners in the towns where they reside," is to determine where ships shall be taxed, whether at home or abroad, or wherever registered. The general object of the *St.* of 1839, *c.* 139, was to determine by law where property should be taxed, which was movable and not always in the same place, and which was owned by persons who had a place of business, or whose property was sometimes placed or registered in towns other than where they resided. There was no reason for thus legislating for partnership property, with regard to which there were no exceptions in the statute, and no such difficulty could arise.

Section 2 of *St.* 1839, *c.* 139, therefore only provides that ships and vessels shall be taxed where the owner, if an individual, resides; or, if a partnership, has its place of business or statute residence; and thus does not change the law as to the taxation of partnership property.

I. A. Gillis, for the respondents. The provision of *St.* 1839,

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c. 139, § 2, that "all ships and vessels, at home or abroad, shall be taxed to the owners in the towns where they reside," controls § 13 as well as the other sections of the Rev. Sts. *c.* 7, even if ships and vessels are to be regarded as partnership property. Otherwise, it would have no application to ships. See also U. S. St. 1850, *c.* 27, 9 Sts. at Large, 440. There is no authority for the construction that "residence" means "place of business."

By the Court. The general rule established by the Rev. Sts. *c.* 7, § 9, is that persons are to be taxed on their personal property in the town of their residence. By § 13 partners are to be taxed as a sole party, and the place of business of partners is likened to the domicil of an individual. Section 2 of the St. of 1839, *c.* 139, did not alter this, but provided where movable property, as horses and vessels, should be taxed.

Writ of certiorari to issue.[*]

William Hale *vs.* Timothy Huse.

A judgment on an award in favor of the builder against the owner of a house, upon a submission of all demands between them, is no bar to an action against the builder by the owner to recover a sum which he is subsequently, though before paying the amount awarded, obliged to pay to discharge the mechanic's lien of a workman employed by the builder, which has not been included in the award. And the owner may, without previous demand or notice, maintain such action, to recover the amount so paid, including the costs of the proceeding to enforce the mechanic's lien.

The testimony of arbitrators, or a majority of them, is admissible to show whether a certain claim was included in their award.

Action of contract for money paid to the defendant's use. At the trial in the court of common pleas, before *Mellen*, C. J., it appeared that in 1853 the defendant began to build a house for the plaintiff, but before it was finished a disagreement arose between them, and in January 1854 the defendant sued the

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[*] But by *St.* 1859, *c.* 114, "taxes on ships or vessels, owned by a copartnership, shall be assessed to each copartner, to the extent of his interest therein, in the town or city wherein he resides."

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plaintiff; and that in March the parties, by submission before a justice of the peace, referred "all matters and demands between them" to three arbitrators, who in May awarded to the defendant a specific sum, for which at June term he obtained judgment and execution, upon which on the 6th of July 1854 a return was made of payment in full, except one hundred dollars.

The plaintiff was allowed, against the defendant's objection, to offer evidence of the following facts: Hiram S. Brown, a laborer who had been employed by the defendant in building the house, filed a petition to enforce his lien in January 1854, which was entered at the ensuing March term of the court of common pleas, and an order of notice was thereon issued and published, returnable at June term, when a default was entered, and the cause continued until March term 1855, when the court passed an order for the sale of the property to satisfy the amount of Brown's bill and costs, which the plaintiff paid. After the execution for the amount of the award had been issued, the plaintiff's agent called upon the attorney of the defendant and of Brown, and told him that Hale ought not to pay the whole amount of the execution as long as Brown's petition was pending, inasmuch as the arbitrators had included Brown's labor in their award. The attorney replied that it was not so included and declared his intention to require payment of both sums, but consented that a hundred dollars should remain unsatisfied upon the execution until it should be decided who should pay Brown. The jury were afterwards instructed that this evidence should not be considered as showing any contract on the part of Huse, but that it was only competent on the question whether the arbitrators did in fact include Brown's claim in their award. On the 21st of April 1855 an *alias* execution was sued out by the defendant for the balance due, and was afterwards returned satisfied in full by a seizure and sale of the plaintiff's property.

The judge, against the defendant's objection, allowed two of the arbitrators to testify, "that in making their award they did not take the matter of Brown's lien into consideration, but allowed for all the work done on the house by the defendant or any of his workmen; and that they arrived at their result by

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deducting from the contract price such sum as in their judgment it would cost to finish the house, disregarding the defendant's bill for days' works."

The defendant objected "that the action could not be maintained, on the ground that this was an attempt to impeach collaterally the award of the referees; that no action lies to recover money paid on a judgment of court still unreversed; that the judgment upon Brown's petition could not affect this defendant, being *res inter alios;* that as Hale paid the money on Brown's decree of sale before he satisfied the defendant's execution, he did not pay it to the defendant's use; that the plaintiff's proper remedy, if he has any, was to review or reverse the judgment upon the award; and that he had not called all the referees, but had undertaken to show the judgment of all by the testimony of but two." But the court refused so to rule, and stated that the jury would be instructed that the plaintiff could recover, if he satisfied them that the referees included Brown's claim in the award.

The defendant then requested the court to rule, "that the defendant was entitled to a demand before the action could be maintained; and that the plaintiff could not recover without proof of notice to the defendant that payment had been made of Brown's bill." But this request was overruled.

The defendant then testified, "that when he met the referees the plaintiff spoke of Brown's lien; that the defendant made his claim in writing, and that Brown's claim, or the amount of labor performed by Brown, was not included; that he expressly told the referees so, and stated to them that he did not make any claim for that, and requested them to omit it; and that when this suit was commenced he did not know that the referees had not complied with his request."

The defendant thereupon, renewing his former requests fo instructions, also requested the court to instruct the jury, "that if they were affirmatively satisfied that the defendant had had no notice, as above, before action brought, the plaintiff could not recover;" and "that if the jury were satisfied that Huse expressly withdrew the amount of Brown's labor from the con-

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sideration of the referees, then it was not within the submission, and the action could not be maintained." But the court refused; and instructed the jury "that even if they were satisfied that Huse gave the referees notice that he did not claim that, and they nevertheless passed upon it, and included it in the award, the defendant would be liable in this action; and that the plaintiff was entitled to recover, if at all, the amount paid by him upon Brown's petition, including the costs."

The jury returned a verdict accordingly, and the defendant alleged exceptions.

S. B. Ives, Jr., for the defendant.

O. P. Lord, for the plaintiff.

By the Court. The proceedings to enforce Brown's lien were the basis of the claim now in suit, and evidence of those proceedings was therefore rightly admitted.

The statement of the defendant's attorney was competent evidence against his principal, as an admission about a matter in which he was an authorized agent.

The evidence of the arbitrators was not offered to impeach their award, but to show that this claim was not included in it; and for this purpose was clearly admissible. And the obligation of Huse to Hale, now sought to be enforced, could not have been embraced in the submission to arbitration, because it did not become a debt until Hale had paid Brown. Hale could not safely pay Brown till judgment; but then it became the duty of Huse to save Brown harmless. This he did not do.

Huse knew of Brown's claim, and therefore no notice to him was necessary. And the costs were rightly included, for Huse might have stopped them at any time by paying Brown's claim.

Exceptions overruled.

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JANE C. LANGLEY *vs.* BOSTON AND MAINE RAILROAD

A railroad corporation incorporated by law in this state is not exempted from liability for the loss of goods delivered to it to be carried over part of its road to the state line, by having previously leased that part of its road to a corporation established by law in an adjoining state, whose road connects with it at the state line.

ACTION OF CONTRACT against the defendants as common carriers, to recover the value of goods delivered to them to be forwarded to Bethel, Vermont, and destroyed by fire in their station at Lawrence in this county.

At the trial in the court of common pleas it appeared that the defendants were the owners of the Methuen Branch Railroad, connecting with their main road and extending thence northwardly to the line between the states of Massachusetts and New Hampshire, where it connected with the road of the Manchester and Lawrence Railroad Corporation, established under the laws of New Hampshire; that the defendants had never carried on said Methuen Branch, but had leased it to the Manchester and Lawrence Railroad Corporation, who had advertised it as part of their road; and that the freight business at Lawrence was in charge of a freight master and assistants appointed and paid by the defendants, but the chief of whom kept in separate books an account of all freight received to go north, and made his returns thereof monthly directly to the Manchester and Lawrence Railroad Corporation.

The defendants contended that, under the provisions of the lease, they were merely acting, in receiving these goods, as the agents of the Manchester and Lawrence Railroad Corporation, and were not liable in this action as common carriers. But *Mellen*, C. J. ruled that they were so liable; to which ruling, after verdict for the plaintiff, the defendants alleged exceptions.

C. P. Judd, for the defendants.

R. Cross & O. P. Lord, for the plaintiff.

BY THE COURT. The defendants could not, by any contract with a corporation established solely by the laws of another

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state, exempt themselves from their liability for goods delivered to them to be carried over a road constructed and owned by them under a charter from the legislature of this commonwealth. To allow this to be done would be to authorize them by their own act to divest themselves of the duties and liabilities imposed upon them by law, and the performance of which was the consideration upon which their charter was granted, and which thus entered into their contract with the Commonwealth.

This case does not come within the *St.* of 1838, *c.* 99, § 1, because one of the two corporations, by whom the contract relied on by the defendants was made, was not established by concurrent acts of the legislatures of New Hampshire and of this state. But even if it had fallen under that statute, the defendants would not have been exempt from liability; for § 3 of that statute expressly provides that notwithstanding any such contract "the corporation owning the railroad shall be liable for all damage done, or injury sustained, on their road, or in the use of the same, in the same manner, and to the same extent, as they would be liable if they performed the transportation themselves." This reservation clearly includes injuries to persons and property. *Exceptions overruled.*

HENRY BIGELOW & another, Administrators, *vs.* ALEXIS POOLE.

An intestate kept and left at his death a little book, "showing," as was stated in a memorandum at its beginning, signed by him, "the moneys I have advanced to my children severally, and to which I shall give credit to any or each of them as they may pay me from time to time." The book was in the form of accounts with each child, one of which showed that a son "had had" a certain sum; and, on the opposite page, these words: "Went into chancery, but paid nothing." He did prove against that son's estate in insolvency the sum thus charged in the book, and interest, and assented to his discharge. *Held*, that this sum was not an advancement, under the Rev. Sts. *c.* 61, § 9.

APPEAL from a decree of the judge of probate, dismissing a petition of the administrators of the estate of Lott Poole, deceased intestate, for a distribution of his estate among his other

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children, omitting the appellee as having had his whole share advanced to him. The facts appear in the opinion.

E. R. Hoar & H. Gray, Jr., for the appellants, cited Rev. Sts. c. 61, §§ 6–10; *Bulkely* v. *Noble*, 2 Pick. 340; *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254; *Berry* v. *Morse*, 1 H. L. Cas. 71; *Clark* v. *Warner*, 6 Conn. 355.

W. L. Brown, for the appellee.

METCALF, J. It is the settled law of this commonwealth, that an advancement, whether of real or personal property, made by an intestate to his child or other descendant, must be proved by the evidence prescribed by our statutes, and by no other. *Osgood* v. *Breed*, 17 Mass. 358. *Ashley's case*, 4 Pick. 24. *Bullard* v. *Bullard*, 5 Pick. 527. *Barton* v. *Rice*, 22 Pick. 509, 510. And by the Rev. Sts. c. 61, § 9, (a reënactment of St. 1805, c. 90, § 3,) "all gifts or grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing, as such, by the child or other descendant." The sole question now before us is, whether Mr. Poole, the intestate, charged in writing any sum as an advancement to his son Alexis.

In *Bulkely* v. *Noble*, 2 Pick. 340, Chief Justice Parker said: "No particular form of words is required by the statute to constitute an advancement; but it must be charged as such, that is, it must be charged in such a manner as to show that to have been the intention." And it was decided in that case, that the words "articles that I let my daughter N. have," written in a book of memoranda, made by the father, of advancements to his other children, showed an intention to charge an advancement to N. *Noscitur a sociis*. But in *Ashley's case*, above cited, it was held that money charged by a father against a child, in the ordinary form of an account book, could not be deemed an advancement; that there was nothing to distinguish such charge from the other book debts of the father.

We are of opinion, in the present case, that the evidence fails to show that the intestate meant to charge his son Alexis as for an advancement of his share, or a part of his share, of the

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intestate's property. The intestate's small book, which is in the case, does not purport to be a book containing entries of advancements to his children, in the sense in which we are now considering advancements. On the title page (as we may call it) of that book is this memorandum, signed by the intestate: "Small book referred to in my last will and testament, dated Aug. 2d 1843, showing the moneys I have advanced to my children, severally, and to which I shall give credit to any or each of them, as they may pay me from time to time. Revised and corrected August 7th 1847, on making another last will and testament." On the second page are these two entries: "On the 2d day of August 1843, my son Alexis Poole has had $1625.00." "On the 7th day of August 1847, my son Alexis Poole has had, beside interest to this day, $1600.83." On the opposite leaf is written "Credt. Went into chancery, but paid nothing." The facts show that in 1853 Alexis took the benefit of the insolvent law, and the intestate proved the above claims, with interest, against his estate in insolvency; that Alexis was discharged from all his debts; and that the intestate consented to his discharge. All this shows a loan, and not an advancement of the son's portion; a debt which the son was to pay, with interest. Such we must have regarded it in law, on the face of the book alone. But, if there had been doubt of this, the treatment of it as a debt by the intestate would decide the question.

In the same book, on the left pages, are entries, made by the intestate, stating the amount that each of his other sons "has had," including interest to a certain day; and on the right pages entries giving them credit for partial payments. The book also states how much each of his daughters "had" (without giving dates) on their respective marriages. These, clearly, are not charges of advancements. The charge against Alexis, therefore, cannot be treated as an advancement, by reason of its being in the same book with those charges.

The last three cases cited and relied on by the appellants' counsel show that this would be held to be an advancement under the English St. 22 & 23 Car. 2, c. 10, § 5, of which, says

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Hosmer, C. J., the Connecticut statute is almost a literal transcript. *Hatch* v. *Straight*, 3 Conn. 34. The difference between that statute and ours will appear by referring to its terms. After directing a distribution of one third of an intestate's surplus property to his widow, and the residue to his children, in equal portions, except such as may have had any estate by settlement of the intestate, or shall have been advanced by the intestate, by portion equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution shall be made, the fifth section thus proceeds: "And in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime, by portion not equal to the share which will be due to the other children, by such distribution as aforesaid; then so much of the surplusage of the estate of the intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated." What shall be deemed an advancement, or by what evidence it shall be proved, is not here prescribed, as it is in our revised statutes. See Lovelass on Wills, (12th ed.) 140; 2 Wms. on Executors (4th Amer. ed.) 1288–1292.

Decree of the judge of probate affirmed.

ANDREW ARTHUR *vs.* ALFRED FLANDERS.

An officer seizing, under a search warrant duly issued for intoxicating liquors, liquors not described in the warrant, is liable to an action by the owner thereof, notwithstanding *St.* 1855, *c.* 215, § 38.

ACTION OF TORT for taking intoxicating liquors out of the plaintiff's dwelling-house under a warrant issued to the defendant by a justice of the peace, pursuant to *St.* 1855, *c.* 215, § 25

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and which were afterwards ordered by the justice, for want of a sufficient description of them in the warrant, to be returned to the plaintiff. The defendant contended that, as the plaintiff had not proved that the liquors were legally kept, he was within the provision of *St.* 1855, *c.* 215, § 38, that "no action shall be had or maintained against any sheriff, deputy sheriff, chief of police or deputy chief of police, or constable, or their assistants, for executing any warrant or order issued under this act by any justice or court competent to try the same; nor shall any action be had or maintained against any officer for seizing, detaining or destroying any intoxicating liquor, or the vessels containing it, unless such liquor and vessels were legally kept by the owner thereof." But THE COURT were of opinion, that the defendant, because he took articles not mentioned in the warrant, was a trespasser, and liable to this action. See *Ewings* v. *Walker*, 9 Gray, 95. *Judgment for the plaintiff.*

S. B. Ives, Jr., for the plaintiff.

W. C. Binney, for the defendant.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF SUFFOLK, NOVEMBER TERM 185. AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. BENJAMIN F. THOMAS,
HON. PLINY MERRICK,
} JUSTICES.

DANIEL W. LORD *vs.* NEPTUNE INSURANCE COMPANY.

Insurers on the freight of a ship for a voyage are not liable for a total loss, where ther has been no total loss of the ship, and the goods could have arrived *in specie* at the port of destination; although the ship has been obliged by a peril insured against to put back to her port of departure, and the goods, after being damaged by that peril to the extent of more than half their value, or to the extent of goods yielding more than half the freight, have been sold there according to the interests of all parties except the insurers on freight.

If a ship is obliged by perils of the sea to put back to her port of departure, and her cargo is there sold by the master for the interest of all parties except the insurers on freight, the shipowner is not entitled to freight; and, if he defends, on a claim of freight, a suit brought against him by the owner of the cargo for the proceeds of such sale, cannot recover from the underwriters on freight any part of the expenses of such defence.

Insurers on freight are liable for the freight of goods jettisoned, without waiting for the adjustment of the general average; although the policy provides that any loss "shall be paid within sixty days after proof and adjustment thereof."

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Lord v. Neptune Insurance Company.

Under a policy which exempts the insurers from liability for any partial loss on certain goods perishable in their nature, unless it amount to seven per cent. and happen by stranding; and for partial loss on other goods or on the vessel or freight, unless it amount to five per cent.; the insurers are liable for a partial loss exceeding five per cent. on the freight of a cargo consisting of such perishable articles and of other goods, although not occasioned by stranding.

Assumpsit on a policy of insurance upon freight. The case appears in the opinion. It was first argued at March term 1852, and an opinion delivered at March term 1854. The plaintiff then moved for a further argument, which was granted, and had at November term 1854.

R. Choate & E. A. Dana, for the plaintiff, cited some of the cases referred to in the opinion, and *Everth* v. *Smith*, 2 M. & S. 284; *Hurtin* v. *Union Ins. Co.* 1 Wash. C. C. 530; *Simonds* v. *Union Ins. Co.* 1 Wash. C. C. 443; *Miston* v. *Lord*, 1 Blatchf. C. C. 357; *American Ins. Co.* v. *Center*, 7 Cow. 583, and 4 Wend. 45; *Bryan* v. *New York Ins. Co.* 25 Wend. 617; *Whitney* v. *New York Firemen Ins. Co.* 18 Johns. 210, 211; *Ogden* v. *General Mutual Ins. Co.* in New York Court of Appeals (MS.) [referred to in 8 C. 2 Duer, 205 note, 211, 213, 214]; *Hudson* v. *Harrison*, 3 Brod. & Bing. 97, and 6 Moore, 288; *Rosetto* v. *Gurney*, 11 C. B. 176; *Reimer* v. *Ringrose*, 6 Exch. 266, 267; *Blackett* v. *Royal Exchange Assurance Co.* 2 Cr. & J. 244; *Donnell* v. *Columbian Ins. Co.* 3 Sumner, 266; Benecke on Ins. 448, 449; 1 Arnould on Ins. §§ 22, 31, 83, 87; 2 Arnould on Ins. §§ 318, 356, 357, 373, 374, 397, 413; 2 Phil. Ins. (2d ed.) 210, 211, 454, 464, 467, 498, 499.

S. Bartlett & C. P. Curtis, Jr., for the defendants, besides some of the authorities cited in the opinion, cited *Herbert* v. *Hallett*, 3 Johns. Cas. 93; *Saltus* v. *Ocean Ins. Co.* 14 Johns. 138; *Williams* v. *Kennebeck Mutual Ins. Co.* 31 Maine, 455; *Waln* v. *Thompson*, 9 S. & R. 121; 2 Arnould on Ins. §§ 325, 338, 353 (Amer. note), 374; 2 Phil. Ins. 92, 137.

Shaw, C. J. The policy on which this action is founded was made on the 14th of January 1847, and the defendants thereby insured the plaintiff, for whom it might concern, $6000 on the freight of the Barque Dana, at and from New York to Havre, the freight being valued at the same sum, $6000. The same form

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of policy appears to have been used, whether the insurance were on ship, cargo or freight, so that in a policy on freight many of the terms and provisions in the printed part of the policy have no relevancy to the actual subject of the contract.

From the agreed facts it appears that the vessel sailed on the voyage contemplated in the policy on the 27th of January 1847, with a full cargo, on freight payable according to several bills of lading upon the delivery of the goods at Havre. The cargo consisted principally of wheat, flour, green hides, with a few packages of palm leaf, barrels of bacon and kegs of lard.

On the third day out the vessel encountered a violent gale, by which she was thrown on her beam ends, sprang a leak, and a considerable quantity of wheat and flour and of the ship's provisions was thrown overboard to relieve the vessel. In consequence of this disaster, the vessel put back to New York, where it became necessary to discharge the cargo in order to repair the vessel. Most of the articles composing the cargo were more or less damaged, and would require time and expense to put them in a fit condition for reshipment. The owners of the several parts of the cargo, though they had notice of the condition of the goods, declined either to demand them back as they were, or to cause them to be dried and placed in a condition to be forwarded in the vessel, or to require the shipowner to proceed, or to give any directions on the subject; in consequence of which the master sold the goods at auction, and the proceeds came into the hands of the shipowners. They refused to pay over these proceeds to the respective owners and shippers of the goods, without the payment of freight on them. On suit being brought, the shipowners defended on the ground that freight was due, and that they were not bound to account for the proceeds of the damaged goods unless freight was paid. But it was decided otherwise, and the expenses of those suits are claimed as part of the loss sought to be recovered in this action.* After being repaired, the vessel took in another cargo

* The plaintiff, in support of this point, relied upon this clause in the policy: "In case of any loss or misfortune, it shall be lawful for the insured, his factors,

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of corn and other articles, and sailed for Belfast, Ireland, and there delivered that cargo and earned freight thereon.

It will not be necessary to state all the facts in detail; the result is, that the part of the cargo, not thrown overboard to lighten the ship, was brought back to New York; that it remained there *in specie*, and after drying and preparation, which would have taken several months, part of it might have been reshipped on board the Dana, or placed on board of other vessels bound to Havre, and in that condition would have arrived at Havre, much deteriorated in value perhaps, but capable of being delivered *in specie* to the consignees. It is conceded that in the mean time freights had considerably risen in price, so that the vessel could obtain a higher freight in a new voyage than she would have been entitled to, had she successfully performed the voyage for which she was insured, and earned full freight therein. It is further conceded that it was for the interest of the owners both of vessel and cargo, and of the insurers of the cargo, that the whole of the cargo brought back should be sold in its damaged condition, as it was, by the master, rather than to be reshipped and forwarded to its original destination. The question is, whether, under these circumstances, the assured are entitled to recover as upon a total loss of freight.

The general rule governing the rights of the respective parties to an insurance on freight, as a distinct and substantive subject of insurance, was fully considered by this court in the case of *M' Gaw* v. *Ocean Ins. Co.* 23 Pick. 405.

The term "freight" has several different meanings; as the price to be paid for the carriage of goods; or for the hire of a

servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said freight or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute in proportion as the sum insured is to the whole sum at risk." And he cited the following authorities: 1 Arnould on Ins. § 46; 2 Arnould on Ins. § 413, & cases cited; 1 Phil. Ins. 692, 693, & cases cited; 2 Phil. Ins. 243, 464, & cases cited; *Watson* v. *Marine Ins. Co.* 7 Johns. 57; *Hastie* v. *De Peyster*, 3 Caines, 190; *Maggrath* v. *Church*, 1 Caines, 196; *Potter* v. *Providence Washington Ins. Co.* 4 Mason, 298. The defendants cited *Potter* v. *Ocean Ins. Co.* 3 Sumner, 27

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vessel under a charter party or otherwise; and sometimes to designate goods carried, as "a freight of lime," or the like. But as a subject of insurance, it is used in one of the two former senses; and in this policy it means plainly the aggregate of the prices to be received, at agreed rates, for the carriage of several parcels of specific goods, as expressed in several bills of lading. According to the well known rule of the maritime law, as between the shipper and shipowner, freight is payable upon goods shipped, on their arrival and delivery to the shipper or his consignee at the place of destination, and not otherwise. The effect therefore of the insurance on freight is a guaranty that the goods shall not be prevented from arriving at the destined port by any of the perils insured against; and consequently, if they are prevented from so arriving by the direct intervention of any of those perils, whereby the shipowner is deprived of the power of receiving his freight from the shipper, the underwriter will pay the loss. If it is a policy on freight of a cargo laden on board the vessel for the voyage described, especially when the vessel has sailed on that voyage, the policy attaches to the freight of that particular cargo. It follows therefore, as a general rule, with some exceptions, that after the policy has so attached to that vessel and cargo for that voyage, if the vessel is wholly lost by one of the perils insured against, the power of earning the freight is lost, and the insurer is liable on his contract. So if the cargo is wholly lost by one of the same perils, it cannot be carried and earn freight, and therefore it is a total loss of freight, and the insurer is liable. The difficulty lies in distinguishing, in particular and often complicated cases, what facts constitute such total loss of either vessel or cargo, and to what extent the effects of such loss may be mitigated or relieved in favor of the different parties interested.

In the present case no question arises in regard to the vessel; for, though she encountered a violent gale at sea, and was damaged by it, yet she came safely back to port, was soon repaired at a comparatively moderate expense, and was capable of proceeding on the voyage again. In respect to what constitutes a total loss of a vessel, involving a loss of freight, some difference

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exists between the rule of the English law and that of America, the former considering that she is not totally lost if, in the place where she is, under all circumstances, she can be repaired and put in a condition to prosecute the voyage, at a cost less than her value when repaired; whereas it is held in America that the vessel sustains a constructive total loss, which the owner, if he choose, may treat as a total loss by abandonment, if she cannot be repaired for less than half her value, making customary allowances. But there is no intimation that, under either rule, the Barque Dana had sustained a total loss.

The question then is reduced to this; whether the cargo was so totally lost that it was impossible to carry it forward, and earn the freight, which would be due upon it on delivery; and the court are of opinion that it was not. In deciding this question, we must consider what it would have been necessary for the shipowner, the assured in this case, to do, in order to earn his freight. The rule as between shipper and shipowner is, that if the goods arrive at the port of destination *in specie*, capable of being delivered, the owner has carried and is entitled to receive his freight, although they are so deteriorated, by sea damage or otherwise, that they are of no value. If the goods are carried and ready for delivery, the underwriter on freight has made good his guaranty. If the goods have sustained damage by perils of the sea, the owner of them must look to his underwriter on goods, unless he stands his own insurer; the carrier cannot look to the insurer on freight. The question therefore is, not whether the flour, grain and other articles would have been of any or what value, or of sufficient value to pay the freight, but whether, on such reshipment and arrival, they would have remained *in specie*, as flour, wheat, bacon, palm leaf, &c. If so, then it is clear that they were not so totally lost that the plaintiffs were prevented by the perils insured against from carrying them and earning the freight on them.

The distinction between the case of goods destroyed by a peril of the sea, so that they cannot arrive *in specie*, and goods damaged by a similar peril, and so deteriorated that, though they may arrive *in specie*, they will be of little or no

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value, is well established by cases of insurance on goods. It was formerly doubted whether, if goods insured were damaged to more than half their value by a sea peril, and the vessel proceeded to an intermediate port to repair, and the goods when taken out still remained *in specie*, though they would wholly decay before reaching the place of destination, the assured could recover a total loss without abandonment. But it is now well settled that he can. Where hides were thus damaged and carried to an intermediate port, though they remained as hides there, and were sold by the master as hides, yet, it being found that, from incipient putrefaction already begun, they would totally perish before arriving at the port of destination, it was held, that the assured could recover a total loss without abandonment; not because the goods were sold, or because a sale was necessary or expedient; but because the loss was absolutely total, before the sale, by the first peril. *Roux* v. *Salvador*, 1 Bing. N. C. 526, and 3 Bing. N. C. 266; reported also in 1 Scott, 491, and 4 Scott, 1. This case was first tried in the court of common bench, and it was there held to be a total loss, but not recoverable without abandonment, and judgment was given for the defendants. This judgment, upon error, was reversed by the court of exchequer chamber, upon the ground that it was a case of absolute total loss without abandonment; that the peril of the sea affected and injured the goods to such a degree that, before they could reach their place of destination, they would actually have ceased to exist; and that an abandonment was not necessary to give the insurer the benefit of the proceeds, but that such proceeds were a salvage in the hands of the assured, to be deducted from the total loss.

This case of *Roux* v. *Salvador*, though an insurance on goods, and not on freight, is very instructive as to what constitutes an actual or absolute total loss of goods, independently of any abandonment, and in what cases any loss, not absolute, complete or total, may, at the election of the assured, be treated as a technical total loss by abandonment. The voyage was from Valparaiso to Bordeaux, and the vessel went into Rio Janeiro to repair. The hides were damaged by a peril of the sea to

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more than half their value, yet remained *in specie;* but the proof was, that, before the hides could reach their port of destination, by the necessary operation of natural causes they would cease to be hides. There was therefore nothing to abandon. In this case, in the court of error, where the case underwent great consideration and the opinion was given by Lord Abinger, the questions of the right of the assured to abandon, and the principle upon which, by the English law of insurance, abandonment is required, are defined with great exactness. Abandonment is held to be necessary only where the subject matter of insurance, be it ship or goods, or some portion of it, specifically exists, and may enure to the benefit of the insurer, if seasonably relinquished to him; but if the subject matter and every part of it is specifically lost and gone, that subject is totally lost without abandonment. There may be fruits or results of it of great value, as proceeds of sale, in the hands of the assured or his agents, or of public officers, or admiralty courts, or claims over for indemnity against individuals or governments, all which may go to diminish the actual loss. But abandonment is not necessary to enable the insurers to have the benefit of these by way of salvage. If they have been actually realized or received by the assured, by himself or his agents, the amount of such salvage will be deducted from the total loss, on adjustment. If they have not been so received, they will equitably belong to the insurer, after payment of a total loss; and if they be afterwards received by the assured, it will be to the use of the insurer.

The case is a strong authority to this point; that if goods on board ship are damaged by one of the perils insured against, and upon being brought into a port other than that of their destination, the damage is there found to be of such a nature and extent that, taking into consideration their actual condition, the distance of the port of destination and the time necessary for their transportation to such port, and the nature of the commodities, it can be shown that they must totally perish and cease to exist before they can arrive, then they are in effect totally destroyed by the first direct action of the sea peril, they cannot be carried and delivered to the consignee, so as to enable the shipowner to

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earn his freight of the ship. They are as effectually and completely destroyed by such peril as if, instead of sea damage, they had been struck with lightning and consumed. And in this respect it seems to us immaterial whether the goods are memorandum articles or goods perishable in their nature, or not; they are as effectually annihilated by the direct action of the peril insured against, and so totally destroyed by such peril, for all purposes of earning freight by their carriage, in the one case, as in the other. In both cases the shipowner is entirely deprived of obtaining his freight by a peril insured against; the loss of that freight is a total loss to him without abandonment.

Another case was cited at the argument as having a strong bearing on the present case, that of *Hugg* v. *Augusta Insurance & Banking Co.* 7 How. 595. It was decided by the highest authority, the supreme court of the United States, and has a strong bearing upon some points of the present case. But that case differed essentially from the present in many particulars. It was, like the present, an insurance on freight, of the Barque Margaret Hugg from Baltimore to Rio Janeiro and back to Havana or Matanzas or a port in the United States.

The form of the policy in that case does not appear in the report; but from an authenticated copy, with which we have been furnished, it appears to have been written on a blank form, designed to be used alike for insuring ship, cargo and freight indiscriminately, and contains all the usual clauses applicable to each subject. It contained a clause that bar and sheet iron, and a great variety of enumerated articles usually embraced in the memorandum, "and all other articles perishable in their nature, are warranted by the assured free from average, unless general." *

* The whole of this paragraph in that policy was thus: "It is also agreed, that bar and sheet iron, wire, tin plates, salt, grain of all kinds, tobacco, indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, furs, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, free from average under twenty per cent., unless gen-

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The effect of this clause was that no partial loss of such articles could be recovered, except as a contribution to general average. The court assumed there, and we think the argument on both sides went on the ground, that that warranty extended as well to partial loss of freight on perishable articles, as to partial loss on the articles themselves; and as the entire cargo on the homeward voyage, to the freight of which the policy attached, consisted of jerked beef, which was a perishable article, and so found by the jury, the whole inquiry turned upon the question whether this cargo had entirely perished so as to prevent the shipowner from proceeding and delivering the residue, and earning the freight on the part so carried, when a considerable portion of the beef remained *in specie*, and might have been transported to the port of destination, in the same or another vessel, in a passage of three or four days.

In the present case, the warranty differs in form, being an agreement that the insurers shall not be liable "for any partial loss on salt, grain, fish, fruits, hides, skins, or other goods esteemed perishable in their nature, unless it amount to seven per cent., and happen by stranding; nor for partial loss on other goods, or on the vessel, *or freight*, unless it amount to five per cent.; exclusive, in each case, of all charges and expenses of ascertaining and proving the loss." On such a policy, it may well be doubted whether insurers on freight, even on perishable goods, would not be liable for a partial loss on freight exceeding five per cent. by a general ship, and on a cargo consisting of various articles, some perishable and others not.

But there is another particular in which this case differs essentially from that of *Hugg*, which is, that in that case the whole cargo on which freight was to be earned consisted of one perishable article, belonging to the same owner; but in the present case the cargo consisted of various articles forming several shipments, from distinct owners, and therefore the same objection

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eral; and sugar, flax seed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, and pepper in bags or bulk, free from average under ten per cent., unless general."

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does not lie against a recovery for a partial loss of freight, partial only because some portion of the freight was or might have been earned, but, as far as it went, total in its nature, leaving nothing to abandon, and entitled to no salvage.

When, therefore, we say that the case of *Hugg* v. *Augusta Insurance & Banking Co.* is a strong authority in the present case, we mean this; that it establishes conclusively these points: that when goods are shipped on board of a vessel, to be carried to a designated port, whether consisting of perishable or other articles of merchandise, if they remain *in specie* and arrive, the shipper on delivery will be bound to pay the stipulated freight, although the goods are damaged by perils of the sea so as to be utterly worthless; that although the voyage may be retarded, though the goods may be long detained at an intermediate port, and be found to be much damaged, but still can be carried on to the place of destination and there delivered *in specie*, if the shipowner, or the master as his agent, where it is most for the interest of the shipowner and owner of the goods, leaves them or sells them at such port of refuge, he fails indeed to earn the freight which he might have earned; but such failure is not caused by the perils insured against, but by the voluntary act of the assured, and so the underwriter on freight is not liable for such loss.

It is stated, as a fact agreed in this case, that the act of the master in making sale of the damaged goods, the owner of those goods having declined to give any directions respecting them, was a proper and reasonable course so far as all interests were concerned, except that of the underwriters on freight; and the plaintiff alleges, and the defendants deny, that it was also most for the interest of these underwriters. We consider this question as wholly immaterial; that the propriety of such sale of the damaged cargo was a question solely between the master and the owners of the goods, with which these underwriters had no concern; and it should be decided on its own considerations, in the same manner, whether the shipowners had their freight insured or not. One thing is certain, that the master had the rightful possession of the goods for the purpose of carriage, and

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that the owners of the goods could not rightfully demand and obtain the possession, and thus deprive the shipowners, without their consent, of the right of carrying the goods forward, damaged or undamaged, without paying the full freight due on them by the bill of lading. If, therefore, the shipowners, or the master in their behalf, sold the goods whilst they remained *in specie* and might have gone to their destination, they lost their freight, not by any one of the perils insured against, but by their voluntary preference to abandon the voyage and employ their vessel in some other enterprise.

A very similar case was decided by this court, *Clark* v. *Massachusetts Fire & Marine Ins. Co.* 2 Pick. 104. It was an insurance on freight on a large shipment of tobacco from Richmond, Virginia, to Nice. The vessel met with sea damage, and put into the port of Kennebunk to repair. The vessel could be seasonably repaired, though the necessary delay would prove a serious damage to the owner of the tobacco, by the state of the market; and by mutual consent the shipper received the tobacco to be forwarded by another vessel, stipulating to pay freight *pro rata itineris*, if any was due; but it was found that freight was as high from Kennebunk to Nice as from Richmond, and so no freight *pro rata* had been earned. In a suit against the underwriter on freight, it was held by the court that, the property having been thus voluntarily surrendered and the voyage relinquished, the loss of freight was not occasioned by any peril insured against, and that the underwriter was not liable.

We do not mean to intimate that the sale of the goods by the master in New York, diminished as they were in quantity, and in their damaged condition, was not a prudent, justifiable and proper measure, beneficial to all parties. On the contrary, so far as the case throws any light on the subject, we think it was so. But if anybody could complain, it would be the owner of the goods, against the master and shipowners, for a noncompliance with their contract to carry the goods as stipulated in the bill of lading; and whether the master could justify himself against such claim by the exception of perils of the sea, was solely a question between him and the shippers. In point of

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fact the owners of the goods afterwards affirmed the act of the master in making the sale, by claiming the proceeds of the goods thus sold. As he professed to act as their agent in making the sale, their claiming the proceeds afterwards amounted to a ratification, and made the sale good. But if the shipowners, by the master acting under their direction, determined to relinquish the voyage, and redeliver the damaged goods to the shippers, whether entitled to receive any freight *pro rata* upon them, or to sell them on shippers' account, if the damaged goods or any part of them remained *in specie*, and might have been delivered at the place of destination, damaged or undamaged, and earned freight, then the assured voluntarily abandoned his claim for the freight of these goods on this voyage, and therefore has no claim for the loss of such freight against the insurer on freight.

In the case of *Hugg* v. *Augusta Insurance & Banking Co.*, already cited, it was held that, in construing the contract of insurance of freight, the interest of the insurer and of the assured in the cargo was not to be taken into account, nor in any way regarded, in determining whether a total loss of freight had happened from any of the perils insured against. The questions are distinct, as they affect the construction of contracts made *diverso intuitu*.

The doctrine that the contracts of owners and shippers and the several classes of insurers are distinct, and to be governed by considerations severally applicable to each, and the nature and obligation of the contract of insurance on freight, are well illustrated by a late case in the House of Lords. *Scottish Marine Ins. Co.* v. *Turner*, 1 Macqueen, 334, and 4 H. L. Cas. 312, note. It was an insurance on freight from Quebec to Liverpool. The vessel met with damage by perils of the sea and sprung a leak, but was kept afloat by pumping, and arrived at Liverpool, where the cargo of lumber was delivered to the consignee and the freight paid. But the vessel, being found to be a wreck, was abandoned to the underwriters on the vessel; yet as the abandonment related back to the time of the disaster, it was held to carry all the pending freight, not then fully earned and due, with it, and therefore the shipowners who had received the

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freight were held bound to account for it to the abandonees, the insurers of the ship. *Stewart* v. *Greenock Marine Ins. Co.* 2 H. L. Cas. 159, and 1 Macqueen, 328. Upon this, the assured in the policy on freight brought this action to recover a loss, on the ground that, although the cargo reached its port of destination, and freight on it was paid by the consignees to the shipowners, yet they could not hold it to their own use; that it was received to the use of the abandonees of the ship, which was lost by a sea peril, and therefore the freight was lost to them by such peril. But it was decided by the House of Lords, reversing the judgment of the court of Scotland, that when the cargo was brought to its port of destination, though in a wrecked ship, the contract of the insurer on freight was fulfilled; that whether the owners of the vessel had an insurance on the vessel or not, and what were the terms of that contract, were immaterial to the insurer on freight; that if the shipowners abandoned their freight to their insurers, it was in pursuance of a contract with which the insurers on freight had no concern, and that they were not liable.

Having cited this case as an authority, it seems proper, in order to avoid a misapplication of it, to notice that a different rule prevails in Great Britain and this country, in regard to the relative rights of shipowners on the one side, and the respective insurers of ship and freight on the other. By the British law, no freight is considered as earned until the arrival of the ship and goods; and there is no apportionment of a pending freight, not actually accrued; and therefore if there be an abandonment of the vessel, in consequence of a disaster occurring during the voyage, though at a late period of it, the whole of such freight passes to the abandonee of the ship, and no part of it to the insurer of freight, even though freight may have been in form abandoned to him. But by the American rule such freight is equitably apportioned, according to the proportion of the voyage performed at the time of the disaster, to which time the abandonment in both cases must refer back. What was equitably earned before that time goes to those who are previously entitled to the earnings of the vessel, or their abandonees, the

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insurers of freight; that part earned after such disaster goes to the abandonees of the ship, as owners from that time. If at that time, by a fair estimate, nine tenths of the entire voyage have been performed, the abandonees of freight will be entitled to nine tenths, and the abandonees of the ship to one tenth of the freight for the voyage. It seems necessary that this difference be borne in mind in citing English authorities, in reference to American cases, both in reference to the rights of parties and as to the necessity and legal effect of abandonment on freight policies. Mr. Arnould admits that the American rule of apportioning the freight in such cases is more equitable, more consonant with the theory making insurance a contract of indemnity, than the English, and equally practicable; but he shows from unquestionable judicial authority that the contrary rule is there well established. *Case* v. *Davidson*, 5 M. & S. 79, and 2 Brod. & Bing. 379. 2 Arnould on Ins. § 399. 2 Phil. Ins. (3d ed.) § 1649.

It appears by the facts agreed in this case, that though a large part of the cargo was more or less damaged by the disaster, yet some considerable part of it was saved, and remained *in specie* and might have been transported to Havre; that the vessel was repaired and competent to carry it, and therefore the freight insured was not totally lost by a peril insured against.

There is no ground for maintaining that the plaintiffs could successfully claim any freight *pro rata itineris*; both because the owners of the goods did not demand that their goods should be delivered up at New York; and because they were brought back to the port of shipment, and no beneficial service had been done by the shipowners. *Vlierboom* v. *Chapman*, 13 M. & W. 230.

This is also an answer to the claim of the plaintiffs to recover in this suit a proportion of the expenses of defending the suits brought against the plaintiffs by the owners of the goods, for the proceeds of those sold. There was no plausible ground on which the plaintiffs, as shipowners, could contend that they had any claim against the shippers, by way of lien, set-off or otherwise, for the payment for freight of the goods taken out and left at New York.

If any reliance is placed on the fact set forth in the agreement,

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that the Barque Dana subsequently proceeded on another voyage to Europe and obtained freight, and that such freight can enure, by way of salvage or otherwise, to the benefit of the defendants, it is a sufficient answer to repeat that this policy was an insurance on a specific cargo; that the policy had attached and the risk commenced. The voyage afterwards made was a different voyage, to a different port, with a different, though somewhat similar cargo, shipped by other parties. *Jordan* v. *Warren Ins. Co.* 1 Story R. 342, and authorities there cited.

There is no ground to insist that a salvage freight might have been obtained by forwarding the goods by another vessel; for it is agreed that freights were higher from New York to Havre after the vessel returned to port, than the rates stipulated to be paid on the original shipment.

As far as we can perceive from the facts agreed, the course pursued by the master and shipowners, though it might exempt the insurers from further insurance on freight, by the voluntary relinquishment of the voyage, was best for all parties concerned; for the owners of the vessel, because it relieved her from a burdensome enterprise, and enabled the owners immediately to employ her in other, perhaps more profitable service; for the owners of the goods, and their insurers, if any, because it relieved them from the expense of preparing the goods for reshipment, from the danger of further deterioration and loss of value of the damaged goods, and from the payment of freight. And the goods may have sold for as much in their damaged state, at New York, as they would at Havre.

In coming to the conclusion that this was not a total loss of freight, we place no reliance on the fact that there was no abandonment. We are of opinion, that if it was not an actual total loss in its nature, it was not a loss which would enable an assured, by an abandonment, to recover as upon a technical total loss. An abandonment must be of some part or portion of the subject insured. If that subject, whatever it is, is absolutely gone, beyond the control of the assured, though there may be proceeds of sale or other salvage, yet of that the insurer will have the benefit, without abandonment. This distinction was

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the sole ground of decision in the case of *Roux* v. *Salvador*, before cited. See *Smith* v. *Manufacturers' Ins. Co.* 7 Met. 448. If the assured has already received it at the time of adjustment, the insurer will have credit for it as a deduction from the total loss; if not, and if a total loss is paid to the assured, anything received by the assured afterwards, by himself or his agents, he will hold to the use of the insurer, and an action will lie for it. Considering abandonment then as strictly applying to the subject of insurance, and in this case to the freight, there was clearly nothing to abandon. No freight *pro rata itineris peracti* had been earned, because the goods were brought back to the port of shipment; there was no valuable right to earn freight, by forwarding the goods capable of being transported to Havre, because it would cost more than the freight to forward them. There was no freight earned on that voyage, which, according to the American rule, contrary to the English as above stated, could have been apportioned, so that an equitable part might vest in the abandonee of the ship, and another part in the abandonee of the freight; so that the same rule which governs the right of the assured on freight to recover a total loss, as held in the English courts, is applicable to this case. That such loss of freight, if not total in its nature, cannot be converted into a technical total loss by abandonment, seems to be well settled. *Green* v. *Royal Exchange Assurance Co.* 6 Taunt. 68, and 1 Marsh. 447. *Idle* v. *Royal Exchange Assurance Co.* 8 Taunt. 755, and 3 Moore, 115 *Mount* v. *Harrison*, 4 Bing. 388, and 1 Moore & Payne, 14. An offer to abandon, or an actual formal abandonment of freight in this case, would not have altered the character of the loss.

That when goods taken on freight are damaged by a peril of the sea, and require some time to dry and reship them, the freight is not lost, is a well settled principle of maritime law. The shipowner has a lien upon the goods shipped, and is not bound to deliver them without payment of full freight. If such freight is paid, there is no loss on freight, and of course the insurer of that subject is discharged. If the shipowner volun-

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tarily delivers them up, and the owner of the goods consents to receive them, which may be for the best interest of both; so if the owner of the goods, having notice, declines to interfere, and the master, as agent for both parties, and for their mutual interest, sells them, and they affirm such sale and claim the proceeds, as in the present case; in all these cases the freight on these goods is gone; but it is not lost by one of the perils insured against.

A few more direct authorities on this point are here stated. Where, upon a policy on freight of goods, part were wetted with sea, and could not be safely reshipped without drying, which would take six weeks, and the ship went on and left them, the freight was lost; but the insurers of freight were held not liable. *Mordy* v. *Jones*, 4 B. & C. 394, and 6 D. & R. 479. *Griswold* v. *New York Ins. Co.* 1 Johns. 204.

A similar point was decided by this court in the case of *M'Gaw* v. *Ocean Ins. Co.* 23 Pick. 405. In that case the ship could have been repaired seasonably, or the goods might have been forwarded in another, though not on terms which would have caused any saving of freight. They were sold by the master, and it was probably most for the interest both of the shipowners and shippers that they should be sold; but it was held, that for such loss of freight the insurer on freight was not liable.

But in the present case there was a loss of freight, to a considerable extent, by the jettison of part of the goods from which it would have accrued, on the voyage to the place of destination, and other goods absolutely lost. That jettison is a loss by perils of the sea, as well of freight as of goods, hardly needs authorities to support it. *Butler* v. *Wildman*, 3 B. & Ald. 398.

Nor is the owner of goods jettisoned bound to wait for the adjustment of the general average before calling on the underwriters on freight, and in the first instance to seek his indemnity from the other contributory interests; but he may proceed at once by action against his insurers; and if salvage is realized before the adjustment of the loss, by verdict or otherwise, it should be deducted, otherwise it will enure as salvage to the

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insurer.* *Maggrath* v. *Church*, 1 Caines, 215. *Watson* v. *Marine Ins. Co.* 7 Johns. 62. *Vandenheuvel* v. *United Ins. Co.* 1 Johns. 435. *Forbes* v. *Manufacturers' Ins. Co.* 1 Gray, 371.

It appearing, then, by the uncontested facts in the case, that a considerable part of these goods could have been forwarded by the same or another ship, by which freight could be earned; and this not having been done, but the goods sold by the master, acting as agent for the owners of the goods, upon considerations of expediency not affecting the underwriters, in consequence of which there was not an actual or complete total loss; and that it was not a loss of part, which could be made a technical total loss by abandonment, because no abandonment was in fact made, and because it was not a case where the assured could abandon; therefore the court are of opinion that the plaintiff cannot recover for a total loss; but his claims, whatever they are, must be determined by an adjustment as of a partial loss.

The foregoing is in substance the opinion delivered after the former argument. Upon revision, some additional views and illustrations have been stated, and some further authorities cited, in the hope of making it more intelligible.

This opinion having been drawn up and placed in the hands of the reporter, it thus came to the knowledge of some of the parties, whereupon the counsel for the plaintiff made an application to the court for a rehearing, on the ground that the case had not been fully understood, or that some omission or mistake had occurred; in consequence of which no judgment was entered. A rehearing was had, and we have greatly to regret that various circumstances have occurred to cause an unusual delay in bringing the case to a final result.

* The defendants, upon this point, relied on the following clause in the policy: "In case of loss, such loss shall be paid in sixty days after proof and adjustment thereof; the amount of the premium note, if unpaid, and all sums due to the company, from the insured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the said president and directors, they discounting interest for anticipating payment."

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On the rehearing, and in urging the plaintiff's claim for a total loss, the counsel for the plaintiff take a view of the facts in some respects perhaps different from the case as we understood it. We were governed by the main facts as they appeared on the agreed statement. It is true that the deposition of the mate, and some other written evidence, were referred to; but we did not consider that the court were called on to decide contested facts, or draw inferences from evidence. And we have no occasion, it is believed, to refer to that evidence, because, in our view, not affecting any material fact bearing on the case. We considered the case as it appeared in the agreed statement.

It is now insisted, that by the agreed statement, it was agreed and conceded that all the wheat, which was the bulk of the cargo, except six hundred bags, was totally lost for the purpose of being carried to Havre and earning freight. If by "totally lost" the parties meant "physically destroyed," "annihilated," "ceased to exist *in specie*" or retain the character and name in which it was shipped, perhaps we might not have distinctly understood it as going to this extent. The principle we intended to state was, that if it had not ceased to exist *in specie*, though it might be greatly damaged so that upon arrival it would not be worth the sum payable for the freight, still the shipowner had earned his freight, the shipper was bound to pay it on delivery or tender of the damaged goods, the freight was not lost by a peril insured against, and the underwriter was not liable on his contract.

This was the precise point of view in which the facts were to be considered. If the parties intended to be understood that the great bulk of the wheat, in bags, could not have arrived at Havre *in specie*, as wheat — damaged wheat, it may be, sour, musty, incapable of beneficial use, but still wheat — all doubt and ambiguity would have been avoided by agreeing to this in explicit terms. In regard to some portion of the wheat, it was agreed that it could not have been so dried, separated and prepared as to have arrived *in specie;* but the plaintiff alleged that the expenses would have exceeded the value of the goods on arrival.

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Without going into details as to the part of the cargo wholly destroyed or more or less damaged, we were led to suppose that the parties did not, by this paragraph of the statement, mean to agree that the great bulk of the wheat was absolutely annihilated and destroyed; partly by a supposition that, from the nature of the article, wheat in bags, though wet and damaged, it might not wholly perish in a voyage across the Atlantic; and partly because the reduction in the value of the goods shipped, by the perils of the sea, so as on their arrival not to be worth the amount to be paid for their freight, has in some of the earlier cases been regarded as a test of the carrier's right to leave or sell them, and claim a total loss. If in fact it was understood and agreed that all the wheat except six hundred bags was so far injured by sea damage that it would cease to exist before arrival, it would have been easy to avoid all ambiguity by adding to the terms that it could not be restored so as to arrive at the port of destination, the words "*in specie*," or "as wheat," or some equivalent expression.

But however the fact was; or in whatever sense the parties intended to be understood, in the agreed statement of facts; or whether the court in any respect took a mistaken view of that statement, in its details; it will not vary the result to which we formerly came, that the plaintiff cannot recover for a total loss, and that whatever claims he has against the defendant company must be adjusted as a partial loss. A total loss of part of the freight insured is a partial loss. *Moss* v. *Smith*, 9 C. B. 94.

These different views of the facts may indeed make a great difference as to the amount that the plaintiff may be entitled to recover by the adjustment of a partial loss. It is an uncontested fact, that the vessel on her passage, after the policy on freight had attached to that cargo, on that voyage, was struck and overset by a peril of the sea, and the wheat thereby became wet and damaged. Now, if that damage is found to have been immediately attended with incipient decay, and when landed it was in such progress of deterioration that it could not possibly reach Havre as wheat, but in the mean time would totally perish, it would follow, upon the principles hereinbefore stated, that it

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was an entire loss of part of the merchandise, and so a loss of the freight to accrue upon carrying it safely. But this is a question of fact, to be carefully and fully considered in settling the items of a partial loss; and possibly the facts to be ascertained by the assessor, pursuant to the agreement of the parties, may throw some light on the subject.

In adjusting the loss of the plaintiff as a partial loss, the valuation of the freight in the policy, whether more or less than the freight actually chargeable on particular goods, is to be taken as the basis of computation; and every item of freight lost, and every item on which no loss of freight occurred, because the goods were voluntarily surrendered, is to be computed according to the proportion it bears to the whole freight as valued in the policy.

In consequence of the alternative view of the facts here alluded to, and in order to meet one view taken in the argument, it is proper to add that if it should turn out that goods yielding more than half the freight were wholly lost, and so more than half the freight lost, still it would not, in analogy to the case of goods lost or damaged to more than half their value, warrant an abandonment and a recovery for a total loss, had there in fact been an abandonment in the present case. Each item of loss was complete in itself, and no abandonment could enlarge or change it. For the reasons before given at large, there could be no abandonment, because there was nothing to abandon. Abandonment must be of the subject, or some portion or remnant of it. Here the subject was freight, and there was no freight, or claim to freight, actual or possible, which could enure to the underwriters by abandonment.

The loss then is to be adjusted as a partial loss, not because each item of which it is composed was not complete and total in itself, but because the entire aggregate of such absolute losses does not amount to the whole freight put at risk, and insured by and valued in the policy. *Case referred to an assessor.*

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Charles Heebner *vs.* Eagle Insurance Company of Cincinnati.

A policy of insurance on a ship against "total loss only," even if a time policy, covers a constructive total loss.

It is a sufficient abandonment of a ship injured by perils of the sea, and therefore surveyed and condemned on the west coast of the United States, in time of peace, to state in a notice to the underwriters that the assured "having received information of the condemnation of" the ship "at Humboldt, California, hereby abandons all in said vessel insured by" their policy "and claims as for a total loss."

A policy of insurance from an insurance company established in another state, signed by their president and secretary there, but not to be valid until countersigned by their agent here, and issued by such agent here, is to be interpreted by the law of Massachusetts; and one third new for old is therefore to be deducted in estimating a constructive total loss under it.

Under a policy of insurance upon a steamer, which exempts the insurers from liability for breaking of the machinery unless occasioned by stranding, the insurers, if the vessel is injured first by perils of the sea and afterwards by stranding, are liable only for so much of the injury as the assured prove to have been occasioned by the stranding.

In computing a constructive total loss on a vessel stranded on the west coast of the United States, an assessor allowed two months' interest on the funds raised for repairs. *Held*, that this assessment could not be increased by the court without evidence to overcome the assessor's report.

Action of contract on a policy of insurance, numbered 105, and dated July 15th 1850, for $5000 on the Steamer Chesapeake, valued at $40,000, for one year from the 24th of May 1851, "to trade on the west coast of America, and the rivers of the west coast and the islands of the Pacific Ocean," against "total loss only," and containing a stipulation "that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis for ascertaining her value shall be by her valuation in this policy, and if not valued herein, then her actual value at the port to which she belonged at the time of the inception of this risk."

The steamer sailed from San Francisco on the 24th of September 1851 for Humboldt Bay and other ports on the Pacific coast, and after meeting with severe injuries from perils of the sea, and making all possible repairs at intermediate ports, arrived on the 16th of October at Humboldt Bay, where her captain called a survey, which was made; and, at the request of

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her captain, a shipmaster of San Francisco made an estimate of the repairs necessary to be done to make her seaworthy, which was based entirely upon the surveyor's report, and amounted to $22,951, including the expenses of bringing men and materials from San Francisco.

Humboldt is a very small settlement, containing about thirty inhabitants, with no means of repairing vessels. By the travelled route it is between three and four hundred miles distant from San Francisco, where repairs could have been done at from twenty to twenty five per cent. less. One of the surveyors testified that the steamer was not in a condition to go with safety to San Francisco.

In compliance with the report of the surveyors, the steamer was sold by auction at Bucksport, in Humboldt Bay, about the 1st of November, for $2175. Written notices of the sale were posted up in all the towns around the bay. There were from twenty to thirty persons present at the sale.

On the 6th of February 1852 the assured signed and addressed to the agent of the defendants at Boston the following letter: "Having received information of the condemnation of the Steamer Chesapeake at Humboldt, California, I hereby abandon all in said vessel insured by policy of the Eagle Insurance Company of Cincinnati, No. 105, dated July 15, 1850, for $5000; and claim as for a total loss."

The parties agreed that if the court should be of opinion that "under this policy and the facts stated, the plaintiff could recover for a constructive total loss, the case is to be sent to an assessor, to ascertain whether the actual cost of repairs would exceed half the valuation, so as to create a liability therefor on the part of the defendants, and the amount for which judgment should be rendered against them; otherwise, the plaintiff is to become nonsuit." Upon this statement the case was argued at November term 1855.

G. S. Hillard, for the plaintiff.

F. C. Loring, for the defendants. 1. By the terms of this policy the standard of value is the valuation in the policy, and this accords with the law of this state. *Deblois* v. *Ocean Ins.*

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Co. 16 Pick. 303. Under a policy against total loss only, the insurer is not liable for a constructive total loss by reason of damage exceeding fifty per cent. of the value of the ship, and which is in fact only a partial loss, though it may be turned into a total loss by the election of the assured to make an abandonment. *Smith* v. *Manufacturers' Ins. Co.* 7 Met. 448. If the assured had elected to repair, the insurers clearly would not have been liable under this policy, whether the extent of the repairs was less or more than fifty per cent. The liability of the insurer cannot be entirely at the election of the assured. Insurance against "total loss only" is the same as "warranted free from average or partial loss." An insurance on a cargo "against total loss" or "free from average" does not cover a constructive total loss. 2 Phil. Ins. (3d. ed.) §§ 1615, 1767. *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 39. *Moreau* v. *United States Ins. Co.* 1 Wheat. 219. By analogy the same rule must apply to vessels where the damage is less than the value of the vessel. This question was decided by this court many years ago, and the decision has not been questioned since. *Murray* v. *Hatch*, 6 Mass. 465. *Buchanan* v. *Ocean Ins. Co.* 6 Cow. 331.

2. The letter of abandonment is defective, in form and substance; because it states no reasons for abandonment, except that the vessel has been condemned; and neither states the grounds of condemnation, nor gives the insurers any means of ascertaining them. *Peirce* v. *Ocean Ins. Co.* 18 Pick. 83. *Bullard* v. *Roger Williams Ins. Co.* 1 Curt. C. C. 152. *Macy* v. *Whaling Ins. Co.* 9 Met. 359. *Suydam* v. *Marine Ins. Co.* 1 Johns. 181. 2 Phil. Ins. §§ 1681, 1684.

Shaw, C. J. Two questions are presented; first, whether the plaintiff can recover for a constructive total loss; and second, whether the plaintiff gave a seasonable and sufficient notice of abandonment.

1. The first question is, whether, under this policy, the defendants are liable for a constructive total loss, caused by the perils insured against, to more than half the value of the vessel.

The natural and grammatical construction of the language, "liable for a total loss only," is, any total loss, as that term is

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known and understood by those conversant with the practice and law of insurance. The distinction between an actual and constructive total loss is well known and understood; and if the parties intended to qualify it, and limit the liability to either particular species of total loss, we think they would so have expressed it. But there is nothing in the policy to indicate that the insurers are not to be liable for a constructive total loss, if perfected as such by an abandonment; and we see nothing in the principles of the law of insurance, from which such a distinction can be implied against the letter of the contract.

The leading authority relied on is that of *Murray* v. *Hatch*, 6 Mass. 465. It is observable that that was an insurance on vessel, cargo and freight, and against a total loss only. The vessel remained *in specie*, capable of being repaired, a few days' sail from the United States, and there was no abandonment. The case was argued and considered on the assumption that there was no abandonment; but the plaintiff insisted that, upon the facts then appearing, there was a total loss without abandonment. There was no adjudication, therefore, upon the proposition that, in an insurance on vessel against total loss only, proof of a constructive total loss will not sustain the action. It is admitted by the eminent judge who gave the opinion, Mr. Justice Sewall, that no precedent like it had been cited; but his reasoning is founded upon the supposed analogy between the restriction in this policy and the cases of exceptions and warranties against particular averages and partial losses on certain goods, as illustrated by reference to the case of perishable articles, embraced in the common memorandum, being excepted from liability for losses on account of sea damage. These exceptions are manifestly founded on the impossibility or extreme difficulty of distinguishing, in the memorandum articles, damage arising from sea perils, and that arising from the natural tendency of the articles themselves to natural decay or deterioration. All the cases cited are those of perishable goods, whence he draws the conclusion that in cases arising under exceptions of particular average, or warranty against partial losses, the insurer is liable only for a total loss, where the sub-

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ject matter of the insurance is absolutely destroyed. The opinion is there expressed that where the policy is limited, as in that case, to be upon the risk of a total loss only, the same principles must govern the decision. The reasoning upon the evidence there goes to show that the vessel remained *in specie*, was capable of being repaired, and according to one statement might have been repaired for less than half her value as expressed in the policy, and the court decide that the evidence did not prove an actual total loss. There was also a sufficient reason for setting aside the verdict of the jury and ordering a new trial, that in finding for the plaintiff for a total loss, they had not deducted the salvage held by the plaintiff.

This case was no doubt decided right, because the assured had not complied with the indispensable condition of fixing a constructive total loss, where the loss was not absolutely total in its nature, by a seasonable abandonment. This case was cited in the case of *Buchanan* v. *Ocean Ins. Co.* 6 Cow. 331; but that was a case where the court had first decided that the plaintiff had no insurable interest, and where of course nothing would have passed to the underwriter by an abandonment. And the point was not necessary to the decision of the case then before the court.

The distinction between damage to goods to more than half their value, and damage to a vessel to more than half her value, as giving a right to abandon, and laying the foundation for a constructive total loss, is well illustrated by the case of *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 39. There it was held, that where a constructive total loss is sought to be maintained, upon the ground of deterioration of the cargo, by some of the perils insured against, to more than half its value, all deteriorations of memorandum articles are to be excluded from the estimate of damages; and that, in order to establish such a constructive total loss, damage from the perils insured against must be found to have been sustained by the residue of the cargo, as if the whole of the memorandum articles were sound, to warrant an abandonment. This construction is obviously necessary to carry out the rule that the insurers are to be exempted from

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all losses on memorandum articles, unless of a general nature specified, as by capture or stranding; and is plainly founded on the impracticability of proving whether the damage found in these perishable goods be attributable to perils of the sea, or to internal causes.

But we think this case establishes the principle that damage to more than half the value by sea perils to goods not in the memorandum, and *a fortiori* damage to a ship by perils of the sea to a like amount, does amount to a constructive total loss, and at the election of the assured, by a regular abandonment, becomes a legal total loss. That the distinction is limited to memorandum articles seems to be recognized in *Moreau* v. *United States Ins. Co.* 1 Wheat. 219, and the cases there cited and referred to.

There seems to be no reason in the nature of the contract, or of the business to which it refers, why the liability of the insurers should not extend as well to a constructive, as to an actual, total loss. It is true that no voyage is lost or defeated, because no voyage was in contemplation, it being a policy on time; but by the perils insured against, all further navigation of the vessel was defeated and put an end to, the whole purpose of the enterprise, that of employing the vessel in profitable navigation during the year, was defeated. The court are therefore of opinion that under this policy the defendants were liable for a constructive total loss by the perils insured against, if followed by a legal abandonment.

2. The next question turns upon the form, legal effect and sufficiency of the notice of abandonment.

It appears by the evidence that the vessel was damaged by the violence of the sea and stress of weather, and was at a small port on the western coast of America, and the evidence tended to show that, if she could be repaired there, the expense of such repairs, after making the customary and stipulated deductions, would amount to more than half her value as expressed in the policy. Damage of a vessel to more than half her value, as a ground of abandonment and constructive total loss, seems now to be settled as the rule of American law, conformably to

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that of some of the maritime states of Europe, contrary to the English rule, which requires proof of damage to such an extent that the repairs of the vessel in the place where it is would be equal in amount to the value of the vessel when repaired. *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 39. The master called a survey, and, in compliance with the report of the surveyors, sold the steamer at auction at Humboldt Bay. These things occurred early in November 1851; and on the 6th of February following notice of abandonment was given by letter by the plaintiff to the agent of the defendants, residing in Boston. In deciding on the character of this notice, we are to consider the relative situation of the parties, what they respectively knew and understood, and what was the subject matter of the communication.

The Chesapeake was a steamer, owned by the plaintiff, insured by the defendants about six months before, for no voyage to be made from one port or another to carry any particular cargo, but for the term of one year, at all ports and places, with the general purpose to trade on the west coast of America, insured against total loss only. The vessel was at a great distance from her home port by sea, but the communication by letter, by way of the Isthmus of Panama, was between one and two months.

The notice and offer of abandonment is certainly brief, and in a form not to be recommended; still the question is, whether it is sufficient. The difficulty lies in the ambiguity of the word "condemnation," as a cause of loss, accompanied by a demand for a total loss. The term, in its application to the subject matter, may import a hostile capture, and condemnation consequent thereon, but it may also mean that the vessel has been condemned as innavigable, as incapable of keeping the sea, on account of damage, and so declared by persons of competent authority. In several insurance cases, referred to in the course of this discussion for other purposes, we have seen the phrase, after describing the shattered condition of a vessel, "she was condemned to be sold." We are then brought to the question how it was used in the present case, what did the writer mean

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in using it, and how was it understood by the agents and officers of the company.

It was a time of profound peace; the place was Humboldt Bay, on the west coast, described as in California, and of course within the limits and jurisdiction of the United States. The idea of capture and judicial condemnation as prize could hardly have arisen in the mind of the agent to whom this notice was addressed; and it is quite manifest that it was not so used by the writer. Under the circumstances therefore it must have been naturally understood that the vessel had been condemned as unfit for further purposes of navigation, according to the actual state of facts. Besides, it was not a positive assertion of the fact, but only "information," of course by letter; and if the company were actually in doubt, or desired fuller intelligence on the subject, it was only to ask for the letter, or other source of the information. It did not, and had no tendency to, mislead the company by stating one cause of loss, and afterwards attempting to recover by proof of loss from a different cause.

It was an explicit transfer and relinquishment of all the assured's right and interest in the vessel, in the proceeds if rightfully sold, and in any and all salvage which had been or could be obtained. In this respect it differs essentially from the case of *Peirce* v. *Ocean Ins. Co.* 18 Pick. 83, in which the abandonment was held insufficient, because it was a mere notice to the company of the state of the vessel, and did not by any of its terms relinquish, transfer and abandon claims for the proceeds of the vessel from the time of the loss, or other claims for salvage. The remarks made in giving the opinion in that case are made in reference to the subject matter and circumstances of the case.

A subsequent case, more analogous to the present, came before this court, and the question of the sufficiency of the notice of abandonment was fully considered. *Macy* v. *Whaling Ins. Co.* 9 Met. 354. The insurance was upon cargo, but the notice of abandonment was only that the ship was lost. But the court held that, under the circumstances, being a whaling ship, the loss of the cargo might well have been understood from the loss

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of the ship; and the plaintiffs having in form abandoned their interest in the cargo insured by the defendants, the abandonment was not rendered invalid by the informality in the notice. And in another clause the court say, where the insured makes his abandonment and claims for a total loss, under the policy, without stating the cause of loss, but refers to the intelligence he has received, the abandonment will not be defective, because the underwriter can call for the information on which it is grounded.

No form of abandonment is established either by law or the usage of this branch of business. Any form therefore, which gives the underwriters information of the nature of the loss by one of the perils insured against, and of the readiness of the assured to abandon all rights, interests and claims to the subject of the insurance, and the avails and proceeds thereof, is sufficient. In the present case, the assured, in their notice and offer of abandonment, by referring to their information of a fact which might have been caused by one of the perils insured against, and which the assured claimed was in fact so, by an explicit relinquishment of all rights to the vessel and the proceeds thereof, and all salvage, and by a demand for a total loss, gave the defendants notice or the means of knowing the nature and particulars of the loss as it actually existed; and as the company signified no desire to be put into possession of the information, the court are of opinion that the notice was sufficient.

Case referred to an assessor.

The assessor reported the amount of the loss as $18,638.31 The plaintiff excepted to his report in the following particulars:

1. "The defendants were a corporation established at Cincinnati in the state of Ohio. At the time the insurance was effected the plaintiff resided in Philadelphia, and employed a broker in Boston to procure this insurance. The defendants had an agent there duly authorized to make insurance contracts, who was furnished with blank policies, signed by the officers of the company, in which it was declared that they should not take effect until

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countersigned by said agent. The contract was made, and the policy filled up, signed and delivered, in Boston. The policy did not contain the clause, common in Boston policies, that the insured may not abandon in case of damage, unless the amount made up as a partial loss should exceed one half of the valuation."

The plaintiff contended that the rule of a deduction of one third new for old, in cases of total loss, was peculiar to this commonwealth, and was therefore not applicable to this case. But the assessor refused to adopt this view.

2. In the face of the policy this clause was written: "It is understood that this company is not liable for any derangement or breakage of the machinery or bursting of the boilers, unless occasioned by stranding."

The only evidence upon this point was the following testimony of the captain: "The steamer did meet with an accident after leaving Umpqua and crossing the bar. She was struck on the starboard bow by a very heavy sea, giving the vessel stern way, and, the helm being hard-a-port, broke both of the rudder pintles, stove two boats and the bulwarks and stancheons, and did a great deal of injury to the engine and cabin, and ruined most of the stores. Had no cargo in at the time. After the rudder was carried away, the vessel was steered by the propellers, as well as we could, by backing on one and going ahead on the other; they being nearly useless, having been badly strained by the sea that struck the vessel. By this means, managed to keep off shore during the night. The wind becoming a little more fair the next day, made all possible sail for Port Orford. We left Port Orford on the 10th of October for Trinidad, and arrived there on the 12th. There being a very heavy swell heaving into Trinidad Bay, she dragged her moorings and struck on the rocks, remaining there from half to three quarters of an hour, striking heavily, breaking two of her planks, and otherwise straining her, and making her leak worse. We immediately got out a kedge and kedged her off, and found that she leaked worse than before."

The assessor's conclusion on this point was as follows: "It

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may be fairly inferred from the evidence, that some damage was done to the machinery by the stranding; but it is equally clear, I think, that the substantial injury, both to the hull and machinery was occasioned by the heavy sea by which the vessel was struck after leaving Umpqua. As the evidence stands, any estimate of the amount of damage done to the machinery by the stranding must be to a great degree a matter of conjecture. I think that it will be going quite as far as, if not beyond, what the evidence will warrant, to estimate the damage thus occasioned as one fourth of the total amount of damage sustained by the machinery."

3. "The plaintiff claimed to add the cost of raising funds in California to meet the necessary repairs, at five per cent. per month for three months, the time necessary for meeting drafts on the east. The defendants objected to this item, on the ground, that, as the steamer was insured to trade on the west coast of America, she must be considered as having been at a home port, and the owners were bound to be provided with all necessary funds there.

"Humboldt Bay, where the steamer lay, and where the repairs must have been made, if at all, as the steamer was not in a condition to be removed, was a small settlement of twenty or thirty persons, about five hundred miles from San Francisco. The plaintiff then resided in Philadelphia, and the captain, who was the other part-owner, at San Francisco. Neither of them had any funds at Humboldt Bay, nor in San Francisco, except a small sum which the plaintiff had there in the hands of an agent, the proceeds of some goods sold on commission. The plaintiff was a man of large property, and in good credit at home, and the captain's means were very limited. The cost of raising the necessary funds at Humboldt Bay, or at San Francisco, would have been at least five per cent. per month."

"The charge of five per cent. per month, for two months, making ten per cent. on the amount necessarily expended, seems reasonable and is allowed."

The exceptions to the assessor's report were argued and decided at March term 1859.

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Hillard, for the plaintiff. 1. The contract of insurance is a contract of indemnity, and is to be construed in such manner, if possible, as to give it effect. The Massachusetts rule of deducting one third new for old should not be applied to this case. The place of the contract is Ohio, and not Massachusetts. In the absence of any rule peculiar to Ohio, the rule of the supreme court of the United States should be applied. Story Confl. §§ 293 *b*, 299, 300 *b*, 301. *Chapman* v. *Robertson*, 6 Paige, 630. *Hyde* v. *Goodnow*, 3 Comst. 266. *Robinson* v. *Commercial Ins. Co.* 3 Sumner, 220. *Bradlie* v. *Maryland Ins. Co.* 12 Pet. 399. This policy has not the clause — that the insured may not abandon in case of damage, unless the amount made up as a partial loss should exceed one half of the valuation — introduced into the Boston policies since the case of *Peele* v. *Merchants' Ins. Co.* 3 Mason, 27. *Wood* v. *Lincoln & Kennebeck Ins. Co.* 6 Mass. 479. *Hall* v. *Franklin Ins. Co.* 9 Pick. 466. *Sewall* v. *United States Ins. Co.* 11 Pick. 90. *Winn* v. *Columbian Ins. Co.* 12 Pick. 278. *Deblois* v. *Ocean Ins. Co.* 16 Pick. 303. *Orrok* v. *Commonwealth Ins. Co.* 21 Pick. 456. *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 191.

2. The assessor's apportionment or distribution of the damage to the machinery is arbitrary and conjectural, not warranted by the probabilities of the case, nor justified by the rules of evidence. For the plaintiff to show how much of the damage was caused by the stranding is practically an impossibility. But the plaintiff shows an injury by a stroke of the sea and an injury by stranding; the burden of proof then shifts to the defendants; they have an affirmative proposition to maintain, to wit, that a certain proportion of the damage was done by the stroke of the sea; and the plaintiff is entitled to the benefit of a doubt. *Gray* v. *Gardner*, 17 Mass. 188. *Attleborough* v. *Middleborough*, 10 Pick. 378. *Powers* v. *Russell*, 13 Pick. 76. Exceptions of risk are to be taken most strongly against the insurer, for whose benefit they are intended. *Palmer* v. *Warren Ins. Co.* 1 Story R. 360. *Donnell* v. *Columbian Ins. Co.* 2 Sumner, 366. *Blackett* v. *Royal Exchange Assurance Co.* 2 Cr. & J. 244.

3. The plaintiff excepts to that portion of the assessor's report

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which allows only two months' interest on the sum necessary to be raised. Three months' interest at least should be allowed, considering the remoteness of Humboldt Bay, and that it is geographically, though not politically, a foreign port.

Loring, for the defendants.

Bigelow, J. 1. The contract of insurance was finally executed and delivered in this state. It was therefore a contract made here, and the law of this state is to govern its construction and interpretation, without any reference to the domicil of the corporation liable upon it. *Kennebec Co.* v. *Augusta Ins. & Banking Co.* 6 Gray, 208. By the well settled rule of law in this commonwealth, applicable to policies of insurance, where an injury is sustained by a vessel, the loss is not total unless the expense of repairs exceed fifty per cent. of the valuation in the policy, after the deduction of one third new for old. *Deblois* v. *Ocean Ins. Co.* 16 Pick. 314. On this point the report of the assessor is confirmed.

2. The sum allowed by the assessor for injury to the machinery is quite as large as the proof before him would warrant. The burden was on the plaintiff to establish the amount of his loss; and if two perils operated to cause an injury to the vessel, for one of which the insurers were liable, and from the other of which they were exempt, it was for the plaintiff to show definitely the amount of loss sustained by the peril insured against.

3. There are no facts in the assessor's report from which we can infer that any greater amount should have been allowed for interest on the sum raised to repair the vessel. *Orrok* v. *Commonwealth Ins. Co.* 21 Pick. 469. As the presumption is in favor of his finding, in the absence of countervailing proof, his report on this point must stand.

The result is, that the plaintiff's exceptions to the assessor's report are overruled, and he fails to show a constructive total loss, and cannot recover in this action.

Judgment for the defendants.

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JOHN B. KETTELL & others *vs.* ALLIANCE INSURANCE COMPANY.

Under an open policy of insurance in common form, containing the usual memorandum clause, and also this clause, "partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates is excepted," the insurers are liable for a constructive total loss of tin plates; and if a number of boxes of tin plates, shipped and valued as one parcel, is damaged by the stranding of the ship, carried to the nearest market and there sold for less than half its valuation in the policy, deducting the necessary expenses of the transportation and sale, and duly abandoned it is a constructive total loss.

ACTION OF CONTRACT on an open policy of insurance for $25,000 at a nominal premium "on property on board any vessel or vessels to, at and from ports or places, per indorsements." Among the indorsements was this: "February 21, 1854. $4850. Rate 1¾. Premium $84.87. Ship Charles Humberston, from Liverpool to Boston."

The policy was in the common Boston form, against perils of the sea and other perils: "Provided that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flaxseed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods or on the vessel or freight, unless it amount to five per cent.; exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. It is further agreed, that the insurers shall not be liable for damage or injury to goods by dampness, change of flavor or being spotted, discolored or mouldy, unless the same be caused by actual contact of sea water with the articles so damaged; and that the company shall not be answerable for loss or damage, by wet or exposure to the elements, of goods insured as on deck. In

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case of damage, by perils of the sea, to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable." At the end of the last paragraph of the policy, next before the formal conclusion, were printed these words: "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted."

Bigelow, J., before whom the trial was commenced, reserved the case for the decision of the full court, upon a report of which the material parts were as follows:

The shipment in question consisted of five hundred boxes of tin plates, invoiced and valued together at one sum. The Charles Humberston, with the tin plates on board, sailed from Liverpool for Boston on the 1st of March 1854, and was wrecked in Dundrum Bay, on the north coast of Ireland, one hundred and fifty miles from Liverpool. The bottom of the vessel was stove in, so that she filled with water, and the tide flowed freely in and out of her, and she finally went to pieces. The salt water got into all the boxes, and damaged all the plates more or less; some of them were wholly destroyed; and the others, after having been exposed for some weeks to the action of the salt water, were taken out of the ship, carried back to Liverpool, there surveyed, and, "in consequence of their damaged and perishing state," recommended by the surveyors to be immediately sold, and were sold by public auction for whom it might concern. It was for the interest of all concerned that they should be sold at Liverpool. The accounts of sale showed that the proceeds of the sales, deducting the expenses of raising the tin and sending it to Liverpool, were less than half the value of the shipment, but more than half without such deduction.

The plaintiffs introduced several depositions tending to show that the effect of the salt water was to utterly spoil the plates for use as bright tin ware, though they might have been japanned. And there was conflicting evidence upon the question whether, if the tin had been reshipped from Liverpool to Boston, the

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expenses of the reshipment would have exceeded the sum for which it would have been sold upon arrival in Boston.

The plaintiffs made a seasonable abandonment, and claimed a right to recover as for a total loss.

This case was argued before the first decision in the next preceding case of *Heebner* v. *Eagle Ins. Co. ante*, 133.

R. Fletcher, for the plaintiffs. As the loss was more than five per cent., the defendants, under the general enumeration of risks and the memorandum clause, are clearly liable for the loss claimed, whether the goods are regarded as perishable in their nature or not. The expenses are to be deducted in estimating whether the loss exceeded fifty per cent. 2 Phil. Ins. § 1732.

The last clause in the policy — "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates excepted" — is imperfect, unmeaning and nugatory. It does not show whether these articles are excepted from the classes of partial losses for which the defendants are liable, or from those for which they are not liable. If it is to be understood as meaning that the underwriters shall not be liable for any partial loss on tin plates and other articles specified, it is nugatory and void, as being repugnant to the express previous undertaking to be liable for such a partial loss if amounting to five per cent. 2 Parsons on Con. 20 note, 26.

But if this clause is equivalent to the insertion in the memorandum clause of the words "provided that the insurers shall not be liable for any partial loss on tin plates," still the property insured having been damaged by perils of the sea, and never reached its destination, but been justifiably sold at Liverpool, and the actual loss being more than fifty per cent., the plaintiffs, on abandoning, were entitled by the general principles of the law of insurance to recover for a total loss. 2 Phil. Ins. § 1623.

Upon the question, what constitutes a total loss under the memorandum clause, "the adjudged cases present so much discrepancy, as to leave it to the discretion of judges to adopt the doctrine that may seem most consistent with general principles." 2 Phil. Ins. § 1767. Those decisions, which hold that there must be an actual total destruction of memorandum

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articles, in order to make the insurers liable, rest entirely upon the authority of the *dictum* of Lord Mansfield in *Cocking* v. *Frazer*, Marsh Ins. (3d ed.) 219, and Park. Ins. (7th ed.) 181, and not upon any discussion of principles. *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474. *Burnett* v. *Kensington*, 7 T. R. 222. *LeRoy* v. *Gouverneur*, 1 Johns. Cas. 226. *Muggrath* v. *Church*, 1 Caines, 196. *Biays* v. *Chesapeake Ins. Co.* 7 Cranch, 415. *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 39. *Moreau* v. *United States Ins. Co.* 1 Wheat. 219. *Brooke* v. *Louisiana Ins. Co.* 17 Martin, 530. *Wadsworth* v. *Pacific Ins. Co.* 4 Wend. 33. *Robinson* v. *Commonwealth Ins. Co.* 3 Sumner, 220. *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 595. That doctrine is no longer law in England. *Roux* v. *Salvador*, 3 Bing. N. C. 266. 2 Arnould on Ins. §§ 317, 318. It has been rejected in the only American case which has been discussed and decided on principle. *Poole* v. *Protection Ins. Co.* 14 Conn. 47. And it is inconsistent with the decisions of this court that a cargo of a memorandum article, as well as one of any other article, may be abandoned for a loss of the voyage. *Richardson* v. *Maine Ins. Co.* 6 Mass. 119. *Murray* v. *Hatch*, 6 Mass. 465. See also *Tudor* v. *New England Mutual Marine Ins. Co.* 12 Cush. 554.

The memorandum clause properly relates only to articles perishable in their nature, and was adopted to obviate the difficulty of determining whether the injury occurred from external causes or from the perishable nature of the articles insured. The decisions upon that clause do not apply to this case. To hold that there must be a total destruction of sheet iron, iron wire, brazier's rods, iron hoops and tin plates, would make the policy of no value to the assured. It cannot have that construction unless limited to "total loss by the absolute destruction of the property," as in *Guerlain* v. *Columbian Ins. Co.* 7 Johns. 527.

The goods were so damaged by the direct operation of the perils insured against, that they could not have been brought to Boston so as to be there of any value as the sort of article and fit for the use of such an article as was shipped; they would not have been worth there more than the freight and charges, and could be made of value only by japanning them and thus

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making them a new article; each of which entitles the plaintiffs to abandon and claim for a total loss.

The ship was stranded and wholly lost, the voyage broken up, and the tin plates for a time wholly submerged, and never reached their place of destination or came to the hands of the assured, but were at least constructively destroyed, so that the assured might abandon and claim for a total loss. 2 Phil. Ins. §§ 1527, 1607.

F. C. Loring, for the defendants. Here was no actual total loss. Under an insurance against total loss only, insurers are not liable for a constructive total loss by damage. *Murray* v. *Hatch*, 6 Mass. 465. 2 Phil. Ins. § 1767.

The English law is said not to recognize any distinction as to totality of loss between goods free and goods not free from average. *Roux* v. *Salvador*, 3 Bing. N. C. 266, by Lord Abinger. 2 Arnould on Ins. § 318. Yet see Tindal, C. J., in *Roux* v. *Salvador*, 1 Bing. N. C. 526. That may well be; for by that law there is no constructive total loss, under a common policy, where the goods can be made to arrive at the port of destination so as to be of value there, or the ship can be repaired at a cost less than her whole value. But the same rule cannot apply in this country where, in an ordinary case, if the damage to ship or cargo exceeds fifty per centum — that is, if the loss is not really total, but partial and beyond a certain amount — the owner has the right to abandon the subject, if he chooses to do so, and to claim payment as for a total loss; not because the thing is really lost, but because the damage to it exceeds a certain amount of its value.

Loss by damage is necessarily partial so long as the subject continues to exist *in specie* and in value. In some cases, known as constructive total losses, the loss is, for the time being, actually total; if it continues so, the owner may recover without an abandonment, the insurer becoming subrogated to his rights. But it is never so in respect to what is called a constructive total loss by reason of damage. Where partial loss is excepted, the contract is that the insurer will pay if the thing is destroyed or the owner deprived of it by a peril, but that he shall not be

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called upon to make good a diminution in value by mere damage. To hold an insurer liable in such case would be unjust, because his liability to pay anything would be made to depend on the will of the assured and the state of the market.

It is settled beyond controversy in this country, that where goods are insured "free from damage" or "partial loss excepted," the insurer is not liable for a constructive total loss by damage. 2 Phil. Ins. § 1767. *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 595. *Lord* v. *Neptune Ins. Co. ante*, 109. *Aranzamendi v. Louisiana Ins. Co.* 2 Louisiana, 432. *Skinner* v. *Western Marine & Fire Ins. Co.* 19 Louisiana, 273. *Depeyster* v. *Sun Mutual Ins. Co.* 17 Barb. 306. *Williams* v. *Kennebeck Mutual Ins. Co.* 31 Maine, 455.

The criterion to determine whether a total loss exists, where the insurance is "free from partial loss" and the loss arises from damage, seems to be whether an abandonment is essential to create a liability for a total loss; if it is, then the loss is constructively, not actually, total, and the insurer is not liable. When the insurance is on a vessel against total loss only, and she is damaged so badly that the expense of repairs will exceed her value when repaired, that is an actual total loss; no abandonment is necessary, and the insurer is liable. But if the damage only amounts to fifty per cent., the loss is only partial; an abandonment is essential, and the insurer against total loss only is not liable. *Bullard* v. *Roger Williams Ins. Co.* 1 Curt. C. C. 148. *Smith* v. *Manufacturers Ins. Co.* 7 Met. 452. And the same test must be applied to insurance on cargo; if it can be made to arrive *in specie* and of value, the loss is not actually total, an abandonment is necessary to make it constructively total, and the insurer "free from average" is not liable.

The facts of this case do not show an actual total loss, even under the most modern English rule, by which, if the goods are actually destroyed in value, or it is impracticable to send them on, because the expense of doing so would exceed the value at the port of destination, it is an actual loss, though the goods might be made to arrive *in specie*. *Roux* v. *Salvador*, 3 Bing. N. C. 266. *Rosetto* v. *Gurney*, 11 C. B. 176. And that rule

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seems to be opposed to the American doctrine. *Hugg* v. *Augusta Ins. & Banking Co.*, and *Lord* v. *Neptune Ins. Co.*, above cited.

Besides, the plates were sold in Liverpool for more than their actual cost; and the sale not being necessary, but only expedient for the benefit of the owner, he must bear the expenses.

Tin plates, though very susceptible of damage, are not perishable in their own nature, like fruits, vegetables, beef, or the like. So long as they continue in existence, they must retain their identity.

Shaw, C. J. [After stating the other facts.] It appears by the accounts of the sales of the tin, that the net proceeds, after deducting the necessary costs and expenses of raising and sending them to Liverpool and the costs of sale, were less than half of the value of the shipment, though the gross sales without such deduction would exceed half the value. But the court are of opinion that the costs and charges ought to be thus deducted. The property would probably bring little or nothing, as taken from the ship on the coast of Ireland; it must be taken to a market; the expenses of such transportation and of the sales at Liverpool were a necessary diminution of the value, and, as such, reduced it to a sum less than half the value of the shipment. All the boxes of tin were alike submerged and lay some time in the salt water, by means of which the tin plates were more or less tarnished and damaged; none of the boxes escaped entirely dry, and some were entirely broken and lost. We have not found it necessary to determine the question of fact, upon which the depositions were conflicting, whether, if the plates had been reshipped from Liverpool to Boston, their original destination, the cost of such transportation would have exceeded the value of the tin upon arrival.

The first question raised in this case is respecting the true construction of this exception, contained in a printed line in the very last clause in the body of the policy, without context to explain or give it effect. "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted." It is contended that as it stands it is senseless and void for uncertainty. The sentence is certainly elliptical

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and abbreviated to the fewest possible words, and so is obscure, as a new clause crowded into an old printed form is likely to be, having neither preamble nor recital to introduce it. But we think that the meaning cannot be mistaken. The main purpose of the whole contract was for one party to insure the other against certain maritime losses, some designated as total and some as partial. It is not repugnant, in the sense in which a clause is contradictory and so void for repugnancy; where a proposition is expressed in general terms, and in the same writing are other clauses limiting or qualifying the generality of this proposition, or excepting something out of it, though not in the same sentence, yet in the same instrument and going into operation at the same time, both may well stand together and have their full force, as if the words of qualification or exception were in immediate connection with the proposition. We can have no doubt that by the true construction of this clause the insurers were not to be liable for loss on tin plates, unless such loss, estimated according to the rules and usages of Boston, should amount to a total loss. It is somewhat like the provision in regard to goods perishable in their own nature, enumerated in another part of the policy. But it differs in one respect; those articles are not absolutely exempted, but the underwriter is liable for a partial loss, in case it be occasioned by the stranding of the vessel, and exceed seven per cent. It is manifest therefore, that if this exception had come under the memorandum clause, the plaintiff would have been entitled to recover, because it is manifest from the uncontested facts of the case, that this vessel was lost by stranding, and the damage to the goods was occasioned thereby and did greatly exceed seven per cent.

What then is the extent of this exception? The natural construction is, that it leaves the insurer liable for all total losses; but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature. The clause in the contract gives no intimation that it is any particular kind of total loss, whether absolute or technical; it simply excludes

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all kind of liability for a partial loss. By the natural construction of these provisions, it would seem that if the goods insured were placed by one of the perils insured against in that situation in which the assured has a right to abandon, and he does abandon, he has sustained a total loss, not within the exception.

But it has been argued that a constructive total loss is not within the exception, but that it must be an actual loss or destruction of the thing to take the case out of the operation of the exception and render the underwriter liable as for a total loss. This is maintained as resulting from a series of decisions, as a well established principle of insurance law. It is not indeed insisted or claimed that there is any such rule, or any judicial decision to such effect, upon this special, unqualified exception of liability for partial loss on commodities of iron, brass and tin; but the argument is, that there is a strict analogy between this exception and the common one applicable to memorandum articles "warranted free of average, unless general, or the ship be stranded," that the rule applicable to the one must include the other, and in case of such qualified exception there must be proof of an absolute total loss to take it out of the exception.

There is certainly a distinction of a practical character between these excepted articles and the memorandum articles which are subject to a limited and qualified exception. The exception is of sheet iron, iron wire, brazier's rods, iron hoops, tin plates, articles liable to be tarnished, corroded and damaged by contact with sea water to almost the whole extent of their commercial value, but indestructible in their nature. One reason given why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that in case of mere damage it was so difficult to distinguish between that part of the visible damage which proceeds from internal tendency to decay, and that part from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish, and memorandum articles liable to decay. Another clause in the policy guards the insurer against loss by dampness

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or other indirect damage to goods, not caused by actual contact of sea water with the articles damaged. So that it is only when these polished but indestructible articles come into actual contact with sea water, and that by stranding or some one of the perils of the sea insured against, that the underwriter can become liable at all; and a loss of this character can in general be ascertained with as much certainty as a similar loss to dry goods, hardware, or other merchandise not perishable in its nature.

It seems a little singular that upon the construction of this special exemption of tin plates and other metal goods liable to tarnish by sea water, there is no judicial decision; none was referred to in the argument, and we have no reference to it in any of the cases, except perhaps where, in a few instances, they are simply enumerated with other memorandum articles. We say nothing now of a case where there is a specific insurance on goods, and they arrive at the port of destination *in specie*, but having sustained damage by a peril insured against to an amount exceeding half their value. It would seem more consistent with the principles of insurance law, that the insured should be entitled to abandon and recover for a total loss, if the goods insured have been damaged by such peril, according to the American rule, to an amount exceeding one half their actual value, and, according to the English rule, to the amount of their entire value. But we say nothing of such a case here, because it is not necessary. This was an insurance on certain specific goods shipped and valued as one parcel, to be taken for all purposes as one subject of insurance, on board this vessel for this voyage. The ship on the voyage was cast away and lost, the goods were with some loss fished up, carried to the nearest market, and sold for a sum which, after deducting necessary expenses, amounted to less than half their value, they were duly and seasonably abandoned, and the court are of opinion, that this was a technical total loss, and such total loss as takes these goods out of the exception.

In considering what amounts to a constructive total loss, we must consider the different rule of law above alluded to as adopted and practised on in England and in this country. In

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England, a ship is not regarded as constructively wholly lost, so as to warrant the assured in abandoning, unless it would cost more to repair the ship, in the condition and circumstances in which she is placed, than her value when repaired; and the same rule applies to goods damaged by the perils of the sea. But by the American law, if a vessel is damaged by a peril of the sea to half her value, or, to speak more exactly, to such an amount that the assurer, after repair, and upon an adjustment as of a partial loss, would have to pay more than half the value; and in case of insurance on goods, if damaged by peril of the sea to more than half their value; the assured may, in either case, consider the adventure at an end, abandon to the underwriters, and claim for a total loss. The existence and qualifications of this latter rule, authorizing the assured on goods other than memorandum articles, upon an interruption of the voyage and a damage of the goods insured to half their value, to abandon, is established and illustrated in the case of *Bryant* v. *Commonwealth Ins. Co.* and the cases there cited. 6 Pick. 131, 9 Pick. 485, and 13 Pick. 543.

We have not thought it necessary to review the English cases on this subject, many of which were cited in the argument, for the reason already given, that they all related to memorandum articles, and not, like this, to a specific exception of goods liable to particular damage, but not perishable in their nature, and not embraced in the common memorandum.

Nor have we found it necessary to examine the English authorities upon another point of some difficulty, where the attempt has been to extricate a loss from the exception of partial loss on memorandum articles, by showing that the loss sought to be recovered was a total loss of part of the goods at risk; and this distinction has sometimes been carried to great extent, and perhaps beyond what the true principle of the law would warrant. It is admissible only, we think, where goods of the same kind are separately invoiced and insured, or where insurance is made specifically upon bales, boxes or other packages, valued and insured by the bale or package, or number of packages, in parcels less than the whole. The loss of an en-

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tire package or parcel thus separately valued and insured is a total loss of memorandum articles, and may be recovered as such within the exception. This point has been put on a right footing and the previous cases ably reviewed by a judgment delivered by Jervis, C. J., in the case of *Ralli* v. *Janson*, in the Exchequer Chamber, in May 1856. 6 El. & Bl. 422.

In the present case, the goods insured, tin plates, were all of one kind, invoiced, shipped and insured in one lot, valued as an entire subject, the whole were to some extent damaged, some entirely lost, so that no question can arise of being one entire subject of insurance, and a loss of more than half of that entire subject.

There is no adjudged case which holds that when such goods, liable to particular damage, but not to decay or destruction, by sea water, are shipped and insured, with an exception of liability for the partial loss, and the goods are damaged to more than half their value by a sea peril, the goods left at an intermediate port, so that by the established rule of law here the assured has the right to abandon, and he does seasonably abandon, this is not a legal total loss, for which he may recover. Upon principle the court are of opinion, that this is a total loss, not within the exception, and the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

Benjamin Collins *vs.* Charlestown Mutual Fire Insurance Company.

Two partners, in an application for insurance on a building, which was required to contain "a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which it stood. In fact, one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should "stand good." *Held*, that the insurers were liable for a loss by a subsequent fire.

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Collins v. Charlestown Mutual Fire Insurance Company.

A description in an application for insurance of a building as used "for the manufacture of lead pipe," or "of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe.

THOMAS, J. This is an action of contract upon a policy of insurance on a lead mill. The parties insured were Benjamin Collins and George L. Stearns, partners under the firm of Collins & Stearns. Collins, the plaintiff, is a mortgagee of the premises, to whom the policy was payable in case of loss. The making of the policy and the loss by fire within the term being admitted, the defendants rely upon two grounds of defence. First, that there was a misrepresentation in the application of the assured as to the title of the estate. Secondly, a representation and warranty as to the use to which the building was then and should be thereafter applied, and a breach of that warranty and representation.

1. The estate was conveyed by deed to George L. Stearns, one of the partners. The legal title was in him. In the application, signed by Collins & Stearns, in answer to the question, "Do you own the land upon which the buildings stand?" the answer is, "Yes." The policy secures a lien upon the land and buildings. One of the provisions of the by-laws is, that "the policy shall become void and of no effect, if the application shall not contain a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk."

So far as respects the lien, the insurance company is not affected. The property is owned by one of the parties to the note. Each partner is liable *in solido*. The lien is therefore perfect. Nor is it easy to see how it was material to the risk, whether the title to the estate was in one or both the partners.

But though the legal title to the land was in one of the partners, the equitable title was in the firm. Stearns held the estate in trust for the partnership. By the written articles of copartnership, Collins was to be charged on the books of the partnership with one half of the cost of the mill. Upon the books of the

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partnership, Stearns was credited with the agreed value of the mill. The estate became part of the capital of the firm. It was the property of the firm, though the legal title was in one of the partners only. Such was the state of the title when the application was made. In the statement that Stearns & Collins owned the estate we see no misrepresentation material to the risk.

The case of *Smith* v. *Bowditch Mutual Fire Ins. Co.* 6 Cush. 448, is quite distinct from that at bar. By the 17th article of the by-laws of that company it was provided that any policy issued by the company should be void unless the true title of the insured should be expressed in the application for insurance; and the plaintiff had no legal title to the estate of which he represented himself the owner. He had only a bond for a deed. No lien therefore was secured. Nor was the true title of the insured expressed in the application.

In the case of *Davenport* v. *New England Mutual Ins. Co.* 6 Cush. 340, in answer to the question whether the estate was incumbered, the answer was in the negative, the estate being at the time subject to heavy mortgages. The case of *Bowditch Mutual Fire Ins. Co.* v. *Winslow*, 3 Gray, 431, is to the same point. It goes no further.

In *Allen* v. *Charlestown Mutual Fire Ins. Co.* 5 Gray, 384, the distinction is made between the preceding cases and one in which the statement as to title was substantially correct, and where the difference, if any existed, did not impair the lien of the company or otherwise affect the risk.

But, as if to free the case before us from difficulty, in January 1854 the partnership was dissolved. Collins transferred his interest in all the assets of the partnership to Stearns. The dissolution and conveyance were made known to the insurance company, and on the 24th of March 1852, with full knowledge of the facts, they indorsed on the policy this agreement: "Agreed that this policy shall from this date stand good to George L. Stearns." And we think it does stand good, unless there is force in the second ground of defence, which is misrepresentation of the purpose for which the building was to be used.

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2. To the question, "For what purpose occupied, and by whom?" the answer is, "By the applicants, for the manufacture of lead pipe only."

The defendants offered evidence to show that the attic of the building was used for the manufacture of reels upon which the lead pipe is coiled. But the answer, and we think satisfactory answer, made by the plaintiff was, that the making of the reels upon the premises was a necessary and essential part of the manufacture of lead pipe. The evidence was submitted to the jury under these instructions: "that the term 'manufacture of lead pipe' would include all that was reasonably necessary and essential for carrying on the business of manufacturing lead pipe in the building insured; that if, for the proper and reasonable carrying on of the business, it was essential to manufacture reels upon the premises, by the machinery and in the manner proved, the representation that the building was used for the manufacture of lead pipe only was sufficient; that the mere fact that it was more economical or convenient to make reels upon the premises was not sufficient to authorize the insured to make such use of the premises." These instructions seem to us entirely correct.

In this view of the case, the question whether the word "only" was contained in the application becomes immaterial. It does not change the force of the words "manufacture of lead pipe," or exclude anything essential to it.

Judgment on the verdict for the plaintiff.

E. D. Sohier & H. G. Hutchins, for the defendants, cited, to the first point, *Davenport* v. *New England Mutual Fire Ins. Co.* 6 Cush. 340; *Packard* v. *Agawam Mutual Fire Ins. Co.* 2 Gray, 334; *Bowditch Mutual Ins. Co.* v. *Winslow*, 3 Gray, 431; Parsons Merc. Law, 511, 513, 514; *Work* v. *Merchants' & Farmers' Mutual Fire Ins. Co.* 11 Cush. 271; *Catlett* v. *Pacific Ins. Co.* 1 Paine, 615, and 1 Wend. 561; *Leathers* v. *Farmers' Mutual Fire Ins. Co.* 4 Foster, 259; *Foster* v. *United States Ins. Co.* 11 Pick. 85.

W. G. Russell, for the plaintiff.

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William K. Lewis & another *vs.* Springfield Fire and Marine Insurance Company.

Insurance against fire was effected on goods "contained in a granite store"; one of the walls gave way, and half of the store and the whole of the adjoining building fell; before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall.

Action of contract upon a policy of insurance for $10,000 against fire, "on stock, steam engine and boiler, fixtures, furniture and safe, contained in the new granite store, No. 93 Broad Street, Boston, Massachusetts," subject to certain conditions of insurance annexed, by which "druggists and apothecaries" are enumerated among the "trades and occupations, goods, wares and merchandise denominated extrahazardous;" and "applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured, and, in case of goods or merchandise, whether or not they are of the description denominated hazardous or extrahazardous; and a false description by the insured of a building or of its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, shall render absolutely void a policy issuing upon such description." Trial in this court, before *Bigelow*, J., who made the following report thereof:

"The plaintiffs' said store No. 93 was separated from store No. 95 by a party wall of stone and brick.

"On the 22d of August 1854 this wall or the foundation thereof gave way, and the whole of store 95 and half of store 93, including the whole of the front wall of the latter store, fell and became a mass of ruins; while the other half of the plaintiffs' store was left standing, supported by a row of iron pillars, which prior to the accident ran through the middle of the plaintiffs' store for the purpose of supporting the floors thereof. Half the roof remained, and covered that portion of the store which remained standing after the accident.

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"At the date of the policy, and at the time of the accident, the plaintiffs occupied the store as tenants, and had stock therein to the amount of seventy thousand dollars and upwards.

"Shortly after the accident above mentioned, with an interval stated by the witnesses to have been between fifteen and forty minutes, a fire (supposed to have been occasioned by the commingling of chemicals) broke out amongst the ruins of the adjoining store aforesaid (which had been used as a drug store); which fire communicated with and burned portions of that part of the plaintiffs' store which remained standing, and also partially burned and damaged some of the goods therein.

"For the purpose of extinguishing said fire, large quantities of water were thrown by the fire department of the city upon the ruins of store No. 95, and into and upon that part of the plaintiffs' store which remained standing, and upon the goods remaining therein, whereby the said stock of goods remaining in that portion of said store was damaged.

"No portion of the goods for which the plaintiffs claimed damage under the policy fell; nor were they injured, otherwise than by fire or water, or both.

"The jury, by order of the presiding judge, returned a verdict for the plaintiffs, which is to be set aside if in the opinion of the full court it cannot be sustained."

H. W. Paine & D. Thaxter, for the defendants. 1. The description "contained in the new granite store No. 93" is a warranty that the property, while covered by the policy, shall be thus "contained" in said granite store. 1 Phil. Ins. §§ 757, 758, 866. *Wood* v. *Hartford Fire Ins. Co.* 13 Conn. 533. *Fowler* v. *Ætna Fire Ins. Co.* 6 Cow. 673, and 7 Wend. 270. *Wall* v. *East River Mutual Ins. Co.* 3 Selden, 370. Conditions of insurance annexed to the policy, *ante*, 159.

2. The stock, for injury to which the suit is brought, was not, at the time of the injury, "contained" in the store, within the meaning of the contract; for, by a true construction of the policy, "contained in" imports "protected by" the store. At the time of this fire the store had ceased to exist as a store; and it is immaterial how long the store fell before the fire. If

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placing the goods on this mass of ruins is sufficient, then the plaintiff might recover if he had placed them there after the fire. [SHAW, C. J. Suppose the goods had been moved out to avoid the fire, would they not be within the description of and covered by the policy?] The fire would then be the proximate cause. If moved for any other purpose, they would not be covered by the policy.

C. P. Curtis & C. P. Curtis, Jr., for the plaintiffs, cited *Stokes* v. *Cox*, 1 H. & N. 533; *Hillier* v. *Allegheny County Mutual Ins. Co.* 3 Barr, 470; *Case* v. *Hartford Fire Ins. Co.* 13 Ill. 676; *Scripture* v. *Lowell Mutual Fire Ins. Co.* 10 Cush. 365; *Nelson* v. *Suffolk Ins. Co.* 8 Cush. 477; *Montoya* v. *London Assurance Co.* 6 Exch. 457; *City Fire Ins. Co.* v. *Corlies*, 21 Wend. 367; *Pentz* v. *Receivers of Ætna Fire Ins. Co.* 9 Paige, 568; Angell on Ins. §§ 115 *& seq.*

MERRICK, J. In support of their objection to the direction which was given to the jury, and to the right of the plaintiffs to recover a verdict for any sum of money whatever upon the facts set forth in the report, the defendants assert and attempt to maintain, first, that in obtaining the insurance upon their stock the plaintiffs warranted that it then was, and thereafter should continue to be, contained in their store described in the policy; and secondly, that the stock which was injured was not contained therein at the time of the occurrence of the fire.

It is unnecessary to discuss or even to notice the first of these propositions, because there appears to be an entire failure to substantiate the second, without which it is not pretended that the former can afford any defence to the plaintiffs' action. All the plaintiffs' stock was in their store, just as the defendants contend they warranted that it should be, when the partition between their own and the adjoining store began to give way. That was the commencement of one common and general disaster. The fire, and the falling of the walls and of other parts of the two stores, which immediately followed, were not separate and independent events, but were merely parts and successive circumstances in the progress of a single calamity. Though the cause and origin of the fire may perhaps be satisfactorily conjectured,

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the precise moment when it was kindled is not known; but the interval which elapsed before it was discovered, after the crash of the buildings had been heard, was certainly very brief. The witnesses who testified of it varied in their estimate of its duration from fifteen to forty minutes. This slight difference of opinion on a mere matter of judgment of the lapse of time is really of no importance. The material fact is, that the flames broke out and burned the plaintiffs' goods before there could have been any possible interposition for their safety, and must thus be considered as having occurred substantially at the same time with the other incidents of the disaster. They were all blended together in one catastrophe, and constituted a single event, upon a due consideration of which the rights of all parties are to be determined.

As it is thus shown that the defendants cannot maintain one of the two propositions, both of which are indispensable to sustain their objection, the direction to the jury to return a verdict for the plaintiffs was correct, and judgment must accordingly be entered upon it.

Judgment on the verdict for the plaintiffs.

HELEN CAMPBELL & others *vs.* JOHN WALLACE.

This court has no jurisdiction in equity to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified copy of which has been filed in the probate court here.

BILL IN EQUITY to enforce the trust created by the following clause in the will of John Wallace, late of Clerkenwell in the county of Middlesex and Kingdom of England: "One fifth of all I possess to be sent to the care of John Wallace, son of James Wallace, 65 Eliot Street, Boston, to be put to interest for the sole use of my sister Helen as long as she may live, and at her death to be divided between her children living and the children of James Wallace, then living, of 65 Eliot Street, Bos-

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ton, North America, share and share alike." This will, as appeared by the bill, was duly admitted to probate in the prerogative court of Canterbury, but never allowed in this state, nor any copy of it filed here, pursuant to the Rev. Sts. *c.* 62.

The defendant demurred to the bill, as setting forth no case within the jurisdiction of this court. And this demurrer was argued and decided at March term 1857.

A. A. Ranney, for the defendant.

E. G. Loring, for the plaintiffs.

THOMAS, J. The question raised by the demurrer is as to the jurisdiction of the court. The bill seeks to enforce the execution of a trust created by the will of an English subject, which has been duly admitted to probate in England, but has never been allowed in this state as the last will and testament of the deceased, under the provisions of the Rev. Sts. *c.* 62, §§ 17–20, 32.

The point raised by the demurrer is therefore, we think, covered by the decision of this court in *Campbell* v. *Sheldon*, 13 Pick. 8. That case was determined under the *St.* of 1817, *c.* 87, which gave this court power "to hear and determine in equity all cases of trust arising under deeds, wills, or in the settlement of estates." But the statute was held not to extend to a will, neither proved in this state nor a copy of it filed and recorded in pursuance of the provisions of the *St.* of 1785, *c.* 12, which were in substance those of Rev. Sts. *c.* 62, in the sections before cited.

The plaintiffs suggest that a more comprehensive jurisdiction in equity as to trusts is given by the Rev. Sts. *c.* 81, § 8, than by the *St.* of 1817, *c.* 87. This may be so; that is to say, the jurisdiction may be extended to trusts other than those created by deed or will; but as to trusts arising under deeds or wills, the jurisdiction under the *St.* of 1817 was full and complete, except in cases where there was an adequate remedy at law. We feel therefore bound by that decision. But if the point were a new one, the difficulties of exercising the jurisdiction prayed for are obvious, and, we incline to think, insuperable.

Demurrer sustained.

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JOHN E. THAYER & another *vs.* JOHN S. TYLER.

It seems, that under the Rev. Sts. *cc.* 90, 92, no judgment can be rendered at the first term upon the default of a defendant who was out of the State at the time of the service of the summons, whether he has ever been an inhabitant of the State or not.

Under *St.* 1839, *c.* 158, judgment cannot be rendered against a foreign corporation, without such notice as is provided by the Rev. Sts. *c.* 92.

Service of process upon a foreign insurance company who have appointed an attorney in this commonwealth to accept service of process against them, as required by *St.* 1851, *c.* 331, must be made upon him.

A trustee in foreign attachment may object on *scire facias* that judgment was rendered in the original action at the first term against the principal defendant, who was not in the State at the time of service, without giving the further notice required by statute in such cases.

SCIRE FACIAS against a trustee in foreign attachment. The original writ was on a policy of insurance against the Franklin Marine and Fire Insurance Company, a corporation established by the laws of New York, and was served on the 3d of September 1853 upon Tyler as trustee. The only service of it upon the corporation, as stated in the officer's return, was "by delivering to John S. Tyler, as the agent of said company, a true copy of this writ by me attested," on the 16th of September. Tyler throughout that month was an agent of the corporation, authorized to issue policies in their behalf, and to adjust losses under the same. He did not however make the policy sued on, and was not an attorney appointed by the company under *St.* 1851, *c.* 331, to receive service of process. But another person residing and doing business in Roxbury was such attorney, duly constituted. The corporation had actual notice of the action before the return day. At the first term the corporation and trustee, not appearing, were defaulted, and judgment rendered against them, and the present action commenced. The case was submitted to the decision of this court upon the above facts and others not material to the decision.

This case was argued at March term 1857.

J. P. Putnam, for the plaintiffs. 1. Assuming that a foreign corporation is an "absent defendant," the service was sufficient. By the Rev. Sts. *c.* 90, § 45, 1st, "if the defendant is out of the State at the time of the service of the summons," the service is

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to be made at his last and usual place of abode; "and," 2d, "if the defendant never was an inhabitant of the state," the summons is to be served upon his tenant, agent or attorney, "and if there be no such tenant, agent or attorney within the State, known to the officer or to the plaintiff, the officer shall certify the facts in his return, and the court *may* thereupon" order further notice, as provided in *c.* 92. The provision of *c.* 90, § 48, that "in all cases when the defendant is out of the State at the time of the service of the summons, he *shall* be entitled to further notice," as provided in *c.* 92, must be referred and restricted to the first class of cases, described in § 45 in precisely similar language — residents and citizens temporarily out of the State; not those who have never been citizens. Those are within the provision of *c.* 92, § 3, that "if the defendant is not an inhabitant or resident within the State," or if his residence is not known, or he has no last and usual place of abode, nor any tenant, agent or attorney, the court "*shall* order the action to be continued" until further notice can be given — which implies that, if there is such an agent, the action shall not be continued. To hold all these provisions applicable to those who never resided here would put §§ 45, 48 in conflict with each other, unless "shall" and "may" are equivalent, in which case the whole of § 45 would seem to be superfluous.

2. The original defendants, being a foreign corporation, are not within the Rev. Sts. *c.* 90, §§ 45, 48; *c.* 92, § 3. *Peckham* v. *North Parish in Haverhill*, 16 Pick. 286. Such corporations were first made liable to be sued, and their property to be attached, by *St.* 1839, *c.* 158, which provides that "the service of the writ in such case shall be made in the manner provided in" the Rev. Sts. *cc.* 90, 92, "with such further service, if any, as the court to which the writ is returnable may order." Chapter 92 of the Rev. Sts. does not provide for "service," but only for notice in certain cases where service has already been made and the court already has jurisdiction. The service required by *c.* 90, § 45, had been made. And the court did not, as they might have done, require any further service under *St.* 1839, *c.* 158, but ordered judgment.

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A foreign corporation, having an agent residing here to conduct a branch of its business, can hardly be considered as out of the Commonwealth, at least for the purposes of notice, within the meaning of the Rev. Sts. But if it can, the Rev. Sts. *c.* 92, § 3, do not require the court to order notice to a party who has already had actual notice. *Morrison* v. *Underwood*, 5 Cush. 52. "Shall" in that section is to be construed "may." *People* v. *Cook*, 14 Barb. 259. *People* v. *Smith*, 1 Parker C. C. 374. *State* v. *Click*, 2 Alab. 26.

3. The officer's return shows a sufficient service on an agent of the corporation. The *St.* of 1851, *c.* 331, requiring the corporation to have a particular attorney upon whom service may be made, does not repeal the Rev. Sts. *cc.* 90, 92, nor preclude service on some other attorney.

4. A trustee cannot plead or prove anything on *scire facias*, which he could have pleaded or given in evidence in the original action. *Wilcox* v. *Mills*, 4 Mass. 218. *Sigourney* v. *Stockwell*, 4 Met. 518. *Smith* v. *Eaton*, 36 Maine, 298.

J. W. May, for the defendant.

Dewey, J. It is difficult to ascertain satisfactorily the precise intent of the legislature in the enactments in the Rev. Sts. *c.* 90 and *c.* 92, in relation to the service of writs upon absent defendants, and particularly as to the necessity of a continuance of the action and an order of the court for further notice to the defendant.

In the case of *Leonard* v. *Bryant*, 2 Cush. 32, where the tenant in a real action was out of the State at the time of the service, and not then a resident or inhabitant, although he formerly had been, and, as the facts add, then "had no last and usual place of abode in Massachusetts," it was held, that, in addition to the service, prescribed in *c.* 90, § 47, of leaving a summons with the tenant of the premises, the case should be continued and notice given in the manner prescribed in *c.* 92, § 3; and a judgment rendered at the first term upon default was held invalid, and subject to be avoided by a third party, without a writ of error.

In the case of *Downs* v. *Fuller*, 2 Met. 135, which was a case

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of an absent debtor having left his family here, but himself an absconding debtor, a judgment taken by the plaintiff at the first term, and without complying with the provisions of *c.* 92, § 3, was held invalid and voidable by a third party.

In the case of *Packard* v. *Matthews*, 9 Gray, 311, the defendant was at the time of the service out of the Commonwealth, and not a resident within the same. Upon a return by the officer that he left a summons for each defendant "at their last and usual place of abode, they being out of the Commonwealth at the time," a writ of error was maintained on the part of the defendant, and the judgment reversed, for want of a continuance and order of notice to the party.

The case of *Morrison* v. *Underwood*, 5 Cush. 52, relied upon by the plaintiffs, was decided by the court upon the single ground of a waiver of further service and a judgment taken by consent; and was not intended to overrule the cases of *Downs* v. *Fuller* and *Leonard* v. *Bryant*, although those cases do not seem to have been adverted to in the published opinion of the court. The case of *Downs* v. *Fuller* would have required the reversal of that judgment, but for the other circumstances appearing in the case, which it was thought removed the ground for sustaining a writ of error.

It is however contended that a distinction exists between persons who have never been inhabitants of the State and those who have removed therefrom, including those temporarily absent; and it is said that foreign corporations are embraced in the class of those who have never been inhabitants here, and the service to be made on them is of the latter character.

Upon this point, the argument on the part of the plaintiffs is that § 48 having used the words "when the defendant is out of the State," which are the same words used in § 45 in describing a class of persons in distinction from those who "never were inhabitants of the State," its provisions must be confined to that class; and if there were no other provisions to be considered in connection therewith, certainly the argument would be a plausible one. But upon recurring to this chapter of the revised statutes, it will be seen that in § 44 the phrase "a person

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out of the State" is clearly used to embrace those who have formerly been inhabitants as well as those who never were inhabitants. So also in § 47, in reference to real actions, the phrase is used in the same double aspect. Indeed, we have in the case of *Leonard* v. *Bryant*, *supra*, directly decided that § 48 does apply to "defendants out of the State" in real actions, and that *c.* 92, § 3, does apply to that class of cases. The words of § 48 of *c.* 90, and § 3 of *c.* 92, seem to apply to all cases of defendants out of the State at the time of the service of the summons, and to embrace as well those who never were inhabitants of the State as those who once had a domicil here.

If the case were therefore that of an individual, the provisions of the statute were not complied with, and the judgment was invalid for that cause.

The further inquiry is, whether the like rule in all respects applies to foreign corporations, as to individuals residing without the State. This is regulated by *St.* 1839, *c.* 158: "The service of the writ in such case shall be made in the manner provided in the ninetieth and ninety-second chapters of the revised statutes, with such further service, if any, as the court to which the writ is returnable may order." It is said on the part of the plaintiffs that *c.* 92 does not provide at all for service, but merely for notice to the party served, and so is not applicable. We think this construction will not do; but on the contrary that the proper view to be taken is, that the legislature in the act of 1839 intended to use the word "service" as properly descriptive of all that was required to be done by *c.* 92, and that they did not consider the service fully completed independently of the performance of the acts required by *c.* 92. In addition to all that was required by *cc.* 90 and 92, they authorize and require such further service as the court may order.

It is then said that a foreign corporation, having an agency established here, and a branch of their business here, should be treated as a domestic corporation for the service of writs. If this were so, there would seem to be no proper officer to serve processes upon, nothing beyond an agent to make insurances. However this might have been independently of the provisions

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of St. 1851, *c.* 331, it would seem that by that enactment, requiring every such foreign corporation, before transacting any business within this state, to appoint by a written power, duly filed with the secretary of this commonwealth, some person resident therein their attorney, and providing that service of process upon such attorney shall be deemed to be sufficient service upon his principals, ample provision was made to secure the rights of creditors in Massachusetts, and to furnish all reasonable facilities for serving process on foreign corporations doing business here, and that no necessity exists for introducing an exception of a very doubtful character based solely upon the fact that such corporation was transacting business here. Such attorney was duly appointed in the present case, and a service upon him would have been effectual as against his principals. But no such service was made.

Can the defendant, on this writ of *scire facias*, avail himself of the invalidity of this judgment against the principal defendants? As a general rule, on such *scire facias* nothing could be pleaded which he might have pleaded in the original suit. But the answer to this objection is that prior to the time of the rendition of this judgment there was no cause of complaint on the part of the defendant. The preliminary proceedings were correct, the case was properly in court, and the defendant could not have pleaded a want of proper service, but the court might at any time during the term, on suggestion of the plaintiffs, order a continuance and further notice to the principal defendants. The time for those acts had not yet passed, and no ground existed for complaint or objection in that respect. The judgment having been taken under these circumstances, the present defendant had no day in court to interpose this objection, and has been guilty of no laches in respect thereto.

Such being the case, and the judgment against the principal being shown to be invalid, this defence must avail the trustee, when sought to be charged on the *scire facias*.

Judgment for the defendant

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FREDERICK M. PINGREE *vs.* HUDSON RIVER INSURANCE COMPANY & Trustee.

An attachment by trustee process against a foreign corporation is defeated by a certificate of discharge of the trustee in insolvency.

TRUSTEE PROCESS against a foreign corporation, and John S. Tyler as trustee, who answered that on the 15th of August 1854, the time of service, he had funds in his possession; that on the 25th of August he received a written notice, dated the 10th of August, from John O. Mott, informing him that Mott had been duly appointed in New York to take possession of all the goods and credits of the corporation, wheresoever existing; that he afterwards received a copy of a decree made by the supreme court of New York in October 1854, adjudging the corporation insolvent, and dissolving it, except so far as was necessary to enable Mott, who was appointed by the decree a receiver, to collect debts and recover property in its name; and that on the 16th of September 1854 Tyler applied for the benefit of the insolvent laws, and all his goods were taken possession of by a messenger, including the sum due from him to the corporation, and he afterwards received his certificate of discharge in insolvency.

C. W. Loring, for the plaintiff.

J. W. May, for the trustee.

DEWEY, J. Under the decisions of this court in *May* v. *Breed*, 7 Cush. 41, and others of like character, we suppose it must be assumed that the assignment of the assets of the principals in New York, under the insolvent laws of New York, would not have any validity as against an attachment made here by one of our citizens, seeking to collect a demand due here.

It appears that insolvent proceedings had been instituted against the principal in the State of New York before the service of the trustee process in Massachusetts, if we give effect to the statement of the trustee in his answer, and the letter therein referred to; but however that may have been, they were only

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the commencement of proceedings, and no order had been passed declaring the principal insolvent, and requiring the suspension of all further business and the liquidation of all its affairs, until after the attachment by the trustee process upon the defendant had been duly served. Nor can the position be maintained that this was a defunct corporation, and no judgment could therefore be rendered against it in October 1854, as the facts do not show that the corporation was actually dissolved, but on the contrary its corporate existence and name were continued for the purpose of closing its concerns.

Independently of the proceedings in insolvency in Massachusetts in reference to John S. Tyler, the supposed trustee, there would seem to be no question as to charging him.

But it appears that on the 16th of September 1854, one month after the service of this trustee process and attachment, the trustee became the subject of insolvent proceedings in Massachusetts, and those proceedings were regularly continued to their proper completion.

Had the original suit by Pingree been one of an attachment of the property of Tyler, then, by force of our insolvent law, *St.* 1838, *c.* 163, such attachment would have been dissolved. But the attachment here made was an attachment of the property of the Hudson River Insurance Company, and not an attachment of the goods, estate or credits of Tyler. The Hudson River Insurance Company have not been the subject of any proceedings under our insolvent law, and no attachment of their property or effects has been discharged therefor under the provisions of *St.* 1838, *c.* 163.

The proceedings in insolvency against Tyler, if they have any effect to defeat the attachment of the credits of the Hudson River Insurance Company in his hands, must so operate because the continuance of the same would be in contravention of the principles of our insolvent law, and in contravention of the rights secured to Tyler as an insolvent debtor.

As regards all cases of such party being summoned as trustee of any goods, effects or credits of any creditor of the insolvent who was a citizen of Massachusetts, the discharge of the trus-

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tee from his preëxisting debts would of itself be a good bar, and a discharge of the trustee process. But it is said that Tyler's debt to a citizen of a foreign state would not, by force of a state insolvent law, necessarily be barred. This is so; and if the question were between such citizen of a foreign state and Tyler, this would seem to be a good answer to any defence set up under such discharge in insolvency. But the question is of a different character. It is between a creditor of a citizen of a foreign state, or, to state the case more accurately, a foreign corporation. And the inquiry is, whether the continuance of the attachment is not incompatible with the provisions of the insolvent law in respect to foreign creditors. It is true that they may not be bound to come here and file their claims against the insolvent, and take their *pro rata* dividends. But they have a right so to do, and the debtor has the right to have this privilege, and the benefits that would result to him therefrom by way of a discharge, unaffected by any proceedings against him to secure a debt of a third person.

It would seem, therefore, that the service of the trustee process upon Tyler should not prevent the proving of the claim of a foreign creditor before the insolvency court in Massachusetts; and, if proved, it would of course be discharged, or be liable to be discharged, in the same manner as the other debts of the insolvent. Such debts might also be a component part of the debts in reference to which a majority of the creditors might signify their assent to a discharge of the insolvent. These proceedings which are secured to the parties, and which may be beneficial to the debtor, will be materially affected if this trustee process is maintainable, and the trustee charged thereon. In the opinion of the court, the proceedings in insolvency having been instituted against John S. Tyler, the supposed trustee, before he was charged as trustee, constitute a sufficient reason for discharging him from liability in this suit.

Trustee discharged.

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COMMONWEALTH *vs.* WILLIAM S. TUCKERMAN.

The treasurer of a railroad corporation is an "officer, agent, clerk or servant of an incorporated company," within the Rev. Sts. *c.* 126, § 29, relating to embezzlements by such persons.

A treasurer of a railroad corporation, who had embezzled their funds, called upon a friend of his, who was a surety upon his official bond and stockholder in the corporation, for advice; and he urged him to go to the directors, and make a clean breast of it, and told him that it would be for his interest to make a full confession; but said nothing, in terms, of a prosecution; told him that the disgrace was in doing wrong, not in suffering punishment for it, and he had better stay and meet the punishment; and (as he testified) "advised him as a friend, a son." The next day they went together to see one of the directors, who, on this stockholder suggesting that he had influence with the other directors and could prevent a prosecution, stopped him, saying that he could and would make no promises, did not know what his own power or duty was, but would do all he rightfully and properly could to prevent his arrest and prosecution, and that he must confide wholly in him and his discretion. *Held*, that confessions made after these conversations were admissible in evidence against him.

If money of a railroad corporation is received by their treasurer, and by him deposited to his credit as such treasurer, and afterwards drawn out by him either in bills or coin, such bills or coin are the property of the corporation, and, while in the hands of the treasurer, subjects of embezzlement by him; and if he afterwards, while still treasurer of the corporation, fraudulently converts such money to his own use, without their consent or knowledge, and without claim of right, it is embezzlement; although the guilty intent does not exist at the moment of drawing the money out of the bank, but is formed afterwards; and although at the time of the fraudulent conversion he intends to restore the amount, and has property sufficient to secure its restoration.

Upon the trial of an indictment for embezzlement, other previous acts of a similar character, enumerated with the one charged in the indictment in a paper drawn up by the defendant as a statement of all sums taken by him, are admissible in evidence to show the intent with which the act charged was committed.

It is not necessary, in order to constitute embezzlement, that there should be a demand of the money alleged to have been embezzled, or a denial of its receipt, or any false account given of it, or false statement or entry concerning it, or refusal to account for it.

INDICTMENT on the Rev. Sts. *c.* 126, § 29, against the treasurer of the Eastern Railroad Corporation for embezzling bank bills for $5000, the property of the corporation. Trial in the municipal court of Boston at December term 1856 before *Abbott*, J.

The attorney for the Commonwealth called John B. Parker, for the purpose of proving confessions of the defendant. The defendant's counsel objected that these had been obtained and made under the influence and by means of encouragement and menace; and, to establish this, called and examined Benjamin

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T. Reed, for the purpose of proving that he had advised and encouraged the defendant to confess upon a promise and encouragement that it would be better for him to do so, and worse for him if he did not; and for the purpose of proving that it was under the continuing influence of hope and fear thus excited that the defendant made confessions in the hearing of Parker.

Reed testified as follows: "I was treasurer and director of the Eastern Railroad Corporation for some years, and continued a director until two or three years since. On the evening of the 27th of June 1855, at which time I held stock in that corporation, though not in my own name, the defendant came to my house at Lynn, late in the evening. His wife was with him. After sitting half an hour, they rose to go home. I went with him towards the stable, where his horse was standing, to see them off. He said nothing until his wife, addressing him, said, 'William, why don't you tell Mr. Reed what you came for?' He made no reply, but began to cry. He then said something, the substance of which was that he was in trouble and wanted my advice. I asked him if he was a defaulter. He said he had loaned money of the Eastern Railroad Company, and could not get it back as it was promised and as he had expected, and in the time when it would be wanted, and that he had deceived me, or had imposed on me. I said he had better go to the directors directly, and make a clean breast of it. The exact words I do not remember; but the substance and purport was, it would be for his interest to go and confess all, and afford all the assistance he could. This was repeated over and over. I said it would be for his interest to go and make a full confession. The expression 'clean breast' was one of the very first expressions I used. I felt great distress and earnestness, and I suppose my manner expressed it. I arranged with him to meet Mr. Hooper the next morning, that he might make a statement which should be fuller than he made to me. By my procurement Hooper came to my office the next morning, and there Tuckerman met him. I then told Hooper that I had said to Tuckerman he had better make a confession of all he had done. I left him and Hooper together. He resigned his office of treasurer that day; but he continued to remain in the

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office for some weeks, assisting, making explanations to the directors and the committee. I never said or did anything, and do not know that any one did, to efface the impression of encouragement or hope which I thus made."

Upon cross-examination Reed testified: "He said, in answer to my question, that he had used the money for other purposes than those of the corporation. I said, Go to the directors, I can't help you. His wife said she had heard of it that evening at Watertown, and could not sleep till she had made him come down and ask my advice. I told him to commit no violence on himself, nor run away; that the disgrace was in doing wrong, not in suffering punishment for it; he had better stay and meet the punishment. I advised him as a friend, a son. He had been my clerk for ten years. I told him it would be for his interest to go and make a full confession. I know I used words which conveyed that meaning in substance. I said nothing, in terms, of a prosecution. I did not go into details. I asked the amount. I think I went up as high as $20,000. He did not know, or did not say, the full amount. I advised him to meet Hooper as a principal director. He engaged to do so. I told him he had better go and make a clean confession and a clean breast of it. Hooper said nothing to Tuckerman in my presence."

On reëxamination Reed said: "He named no sum until after I advised him to make a confession. He made no allusion to any sum received of Ruel Williams; no allusion to this $5000 said to be drawn on the 26th of June. I told Hooper the next morning what I had advised Tuckerman, and repeated it all in presence of both. I procured him this office of treasurer, and was one of his sureties. The bond was $20,000."

The counsel of the defendant thereupon contended that this evidence established a legal cause for rejecting the confessions offered, and objected to their admission. But the court overruled the objection, and admitted the evidence, "not upon the ground that the influence, if any was ever created, did not continue until the time when the confession was made to Parker, but on the ground that the facts appearing in the testimony of Reed were

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insufficient to exclude confessions." Parker was then admitted to testify, and gave evidence of confessions by the defendant which were material in the case.

The attorney for the Commonwealth then called Samuel Hooper, and offered to prove confessions made by the defendant to him upon the 28th of June 1855. To this evidence the defendant's counsel also objected, upon the ground that the confessions made to him were obtained and made under influence, and by means of encouragement and menaces, which menaces, encouragements and inducements they claimed had been made or held out by Hooper, and by Reed in the presence of Hooper; and for this purpose they were permitted to examine Hooper upon his *voir dire*, when he testified as follows:

"I went to Mr. Reed's office on the morning of June 28th, by request of Reed, to meet the defendant. The defendant was there. Reed was there. The defendant was in great distress, excited. Reed urged him to tell me the whole story. The defendant was weeping, greatly agitated. Reed urged the defendant to make a full confession; said I had influence with the directors, and would see that he was not complained of or arrested. I told Reed to stop there; said I neither could nor would make any promises; I had no power to bind the directors; that I had no vindictive feelings against him; that he knew me and must confide in me to do what was right; that I neither knew what my power or my duty was; that I did not know what was right to do. The defendant was reluctant to speak for a good while. Reed tried very hard to persuade the defendant. I told him I had not the power; was only one of the directors, and did not know what was proper and right for me to do. I was on the finance committee, and considered I was there as one of the committee. I told him I had not the power, but had no vindictive feeling, and would do all in my power that I properly could do to prevent his arrest, or any proceedings by the directors, and I have no doubt that I expressed to him in substance what I intended to do. After some considerable time, half an hour's talk or so, the defendant seemed to change and make up his mind. My object was to ascertain the

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condition of the affairs of the company. He was not in a condition to make a statement in detail at that time, nor I to receive one. He made at that time a general statement of his defalcations as treasurer, and said he had the means at home of making an exact and detailed statement of them, which would be accurate, and I told him to make out a written statement, and that any favor to be shown him by the directors, if any, would depend on that statement's being full and correct. I told the defendant I would make no promise of any kind; he must confide entirely in me, and I would do all I rightfully and properly could to prevent his arrest, or his being arrested."

On cross-examination Hooper said: "I said I would make no promises; he must confide in me that, unless I was required by my duty to do so, I should not have him arrested. I told him throughout the interview I neither could nor would make any promises; that he must confide entirely in me, and my discretion, and that I should do in every respect precisely as my judgment and discretion should direct me; that I neither knew what I had the power to do, nor what was right for me to do."

It also appeared that at this time no suspicion had been entertained of the defendant by the officers of the company; that he was under no arrest; that no complaint had been made; and that he met Hooper in consequence of what passed between him and Reed at the interview testified to by Reed.

On reëxamination Hooper testified: "The defendant was in such a condition of mind and feeling on the 28th, that I did not wish to rely upon the details of his statements; I did not think them at all to be depended upon. He said nothing then of the sum of $5000 received of Ruel Williams, or of any sum drawn from the bank on that day. I never heard anything of that until the 29th, when, finding an entry of $5000 on the 26th, I inquired of him concerning it. I arranged with him on the 29th to remain and assist the directors upon, from and after that day, by his explanations and corrections. He did stay, and did assist constantly and faithfully, as far as I knew; and the directors did not, nor any of them, nor any of the committee of investigation, institute this prosecution."

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Reed, on being recalled, testified that he fully understood Hooper to say to Tuckerman that he must confide in him; that if he made a full and clear statement, he might be relied on.

The defendant's counsel contended that this evidence established legal cause for rejecting the confessions as obtained and made under the influence of promises and threats; and objected to their admission. But the court overruled the objection, and admitted the evidence; and Hooper then testified to confessions of the defendant which were material in the cause; and among other things stated that the defendant exhibited and explained to him a written list (which was produced at the trial) of the different amounts of the property of the company which the defendant had appropriated to his own use; and that he explained the last item upon the list, which was "June 26th, $5000," to be $5000 drawn from the Merchants' Bank, originally received from Ruel Williams, and the subject of this indictment.

The evidence in the case tended to show that on the 26th of June 1855 the defendant, as treasurer of the Eastern Railroad Company, received from Ruel Williams $5000 towards a debt due to the company; that he deposited it the same day in the Merchants' Bank to his credit as treasurer of the company, and duly entered the fact of the receipt, and the source from which it came, and the debit thereof upon its deposit, to the Merchants' Bank; that he drew his check on the same day as treasurer of the Eastern Railroad Company upon the Merchants' Bank for $5000, which was paid out on that check to some one; that this check was not entered by the defendant in the books of the company until after his confessions to Hooper, when he charged the amount of it to himself; that it was the defendant's uniform practice not to make entry of money drawn from the bank until he applied it to the making of payments for the company, when he charged it to the accounts to which he had applied it; that in his confession and statement to Hooper on the 29th of June he represented that, of the $5000 so drawn, he changed $3000 into smaller bills to use for the purpose of going to Canada, when he had contemplated going to Canada, but was induced to abandon this intention, and he had

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them in a safe place, and said he would give them to Hooper, which he subsequently did on the 5th or 6th of July; and that the $2000, balance of the said $5000 drawn on said check, he had used for pressing purposes of his own, which he refused to disclose, and never did disclose.

The counsel for the government offered to give in evidence acts of embezzlement of the property of the Eastern Railroad Company, other than and distinct from that charged in the indictment, and committed by the defendant on different days and times, from six months to four years before the act charged in the indictment, while the defendant was treasurer of the corporation. To this evidence the defendant's counsel objected. But the acts were admitted by the court, "so far, and only so far, as they were contained or referred to in the written statement made by the defendant to Hooper, one item of which was the subject of this indictment; not for the purpose of proving, or as having a tendency to prove that the defendant took the money charged in the indictment; but for the purpose of showing that if he took it, it was done with the fraudulent intent to convert it." Evidence was accordingly given, against the defendant's objection, tending to show that the defendant had from time to time embezzled moneys, notes and other similar property of the Eastern Railroad Company, of different amounts and at different times, amounting in all to $174,000; and had concealed the same from time to time, by entries, or omission of entries, in the books and accounts of the corporation, and in trial balances rendered by him to the corporation.

The defendant's counsel presented to the judge many prayers for specific instructions, one of which was "that the treasurer, in regard to moneys or funds under his control and administration, including such funds as were deposited or drawn on the 26th day of June, is not such an officer or agent that the indictment alleging embezzlement of the property of the corporation can be maintained against him;" and the others, as they contended, involved the doctrine that there could be no embezzlement if there was no demand of the money, no denial of the receipt of it, and no false account given of it; and that, in order to con-

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stitute embezzlement, there must be some false entry or false statement, or an express or implied refusal to account.

The judge refused to give the instructions prayed for; and instructed the jury "that, in order to make out the offence charged, the government must prove that the defendant, while treasurer of said company, fraudulently converted to his own use the whole or some part of the money described in the indictment, which was the property of said company, and which had been entrusted to him as their treasurer, and that this conversion was without the consent or knowledge of said company, and without claim of right on the defendant's part, and that this conversion took place while the defendant was treasurer of said company; that if the jury were satisfied that such conversion took place at some time, but were in reasonable doubt whether it was before or after the defendant ceased to be treasurer, it would be their duty to acquit him; that the money converted must be the property of said corporation; and upon this part of the case, if money was deposited in a bank by the defendant to his credit as treasurer of said company, which belonged to said corporation, and the defendant after such deposit drew his check upon the bank, and received the amount of it in bills or coin, either from the bank or any other person who might take it and receive the amount from the bank, the bills or coin so received upon said check would be the property of said corporation, while in the hands of the defendant as their treasurer, and the subject of embezzlement by him, if the other facts necessary to make out the charge were proved; that the government must make out a fraudulent taking and conversion; that what was universally understood by the term 'fraudulent' as well defined the character of the conversion to be proved, as any form of expression — it must be attended and characterized by some deceit, concealment or trick; that proof of a neglect to account for money received by the defendant as treasurer, or proof of a taking and conversion of money of the corporation, did not constitute, in and of itself, the crime of embezzlement, or, alone and unattended by any other circumstances, was not sufficient evidence of it; that the non-accounting might

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be from accident, forgetfulness or carelessness; or the conversion might be under a *bona fide* claim of right, however groundless, that in fact the non-accounting or conversion by the defendant would only be evidence which the jury were to consider in connection with all the facts and circumstances proved, as bearing on the question of fraudulent intent; that upon this part of the case, taking all the evidence put in, the jury were to be satisfied, not only of the conversion, but that it was with a fraudulent intent; but if the jury were satisfied that the defendant, acting as treasurer, took and used the money of the corporation, intrusted to him, for his own purposes, either by appropriating it to his own personal wants, or by lending it to third persons on his own account, and did this, knowing he had no right so to do, without the consent of said company or their officers, and concealing such conversion from them, it would amount to a fraudulent conversion of the money of the company, although at the time of such taking the defendant intended to restore what he had so appropriated, before it should be known, and believed he should be able to do so, and had in his possession property sufficient to secure the full amount so taken; that in reference to other acts of embezzlement, which had been put in evidence, they were only to be considered by the jury in passing upon the intent with which the money charged in the indictment was converted, if converted at all; that the conversion must be first proved by other distinct and independent evidence, and those other instances of embezzlement were not to be used or considered in deciding the question of taking, but only in passing upon the intent, if the conversion was first established by other testimony; that upon the question whether the whole $5000 described had been fraudulently converted, or only a portion of it, the rule of law applicable to it would be this; that if it was proved that the defendant drew a certain amount of money belonging to the company from the bank, where it was deposited usually and in his name as treasurer, and took the money into his own possession, for the purpose and with the design of appropriating it to his own use and putting it out of and beyond the control and power of the company, and concealed such

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drawing from the company and its officers, and then changed the bills so drawn by him, for more convenient use for his own purposes, and absolutely used and appropriated a portion of it to his own wants, and kept the rest, not so used, concealed from and out of the control of the company and its officers for some length of time, it would amount to a fraudulent conversion of the whole sum so drawn, although a part of it was never beyond the defendant's control, and was afterwards restored by him to the company after such facts had been communicated to the officers of the company; that upon these several propositions the burden of proof was upon the government; that although the court had decided the evidence of the confessions of the defendant competent to go to the jury, the weight of the testimony so admitted was a question solely for them, and, in passing upon the degree of credit and weight to be given to the evidence, they were carefully to consider all the facts and circumstances under which the confessions were made, and if they came to the conclusion that such circumstances proved were sufficient to cast suspicion and doubt upon the evidence, they had the right to disregard it entirely in passing upon the questions before them."

The jury returned a verdict of guilty of embezzling bills of the Merchants' Bank of the amount and value of $2000, as set forth in the indictment, and the defendant alleged exceptions.

J. A. Bolles, (*R. Choate* with him,) for the defendant. 1. The defendant, as treasurer of the Eastern Railroad Company, was not an "officer, agent, clerk or servant of any incorporated company," within the meaning of Rev. Sts. *c.* 126, § 29, relating to embezzlement.

2. The confessions made to Parker and Hooper were not voluntary, but were made under authorized inducements, of a personal application and of a temporal character. Joy on Confessions, 4, 5, 23 *& seq.* *Commonwealth* v. *Morey*, 1 Gray, 461. *Commonwealth* v. *Taylor*, 5 Cush. 605. *State* v. *Grant*, 22 Maine, 171. *State* v. *Crank*, 2 Bailey, 66. If the defendant was or may have been brought to confession by the induce-

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ments, the form of words is immaterial. *Commonwealth* v. *Knapp*, 9 Pick. 496.

Whatever Reed promised in Hooper's presence, unless contradicted, must be taken as said by Hooper. *Regina* v. *Luckhurst*, 6 Cox C. C. 243. *Regina* v. *Taylor*, 8 Car. & P. 733. *Regina* v. *Laugher*, 2 Car. & K. 225. *Regina* v. *Garner*, 2 Car. & K. 920. Reed, and still more Hooper, spoke with authority; both as stockholders; Reed as the defendant's friend and surety on his bond; and Hooper as director, as "principal director," as one "having influence with directors," as a member of the "finance committee," and speaking to the defendant as such. Both were pecuniarily concerned, as individuals; Hooper was officially representing the company, and, as a director, the employer and master of the defendant. As such he was authorized to offer inducements. *Regina* v. *Moore*, 5 Cox C. C. 555. *Regina* v. *Taylor*, 8 Car. & P. 733. *Regina* v. *Laugher*, 2 Car. & K. 225. Joy on Confessions, 5. *Rex* v. *Parratt*, 4 Car. & P. 570. *Rex* v. *Kingston*, 4 Car. & P. 387. *State* v. *Phelps*, 11 Verm. 116. A prosecutor is not merely he who has begun proceedings, but any one who, from his close relation to the offence, is likely to prosecute. *Regina* v. *Luckhurst*, 6 Cox C. C. 243. *Regina* v. *Moore*, 5 Cox C. C. 555. *Commonwealth* v. *Chabbock*, 1 Mass. 144. Authorized inducements, however slight, of the character specified exclude all subsequent confessions; nor is the rule varied where the defendant makes the first overtures or propositions of confessions. 1 Greenl. Ev. § 223. *Commonwealth* v. *Morey*, 1 Gray, 461. *Commonwealth* v. *Taylor*, 5 Cush. 605. *State* v. *Phelps*, 11 Verm. 116. *Regina* v. *Luckhurst*, 6 Cox C. C. 243. *Rex* v. *Kingston*, 4 Car. & P. 387. The promises made are as clearly inducements as any reported. Cases already cited. *Rex* v. *Thomas*, 6 Car. & P. 353. *Rex* v. *Walkley*, 6 Car. & P. 175. *Regina* v. *Hewett*, Car. & M. 534. *Meynell's case*, 2 Lewin C. C. 122. *Regina* v. *Garner*, 2 Car. & K. 920. *State* v. *Guild*, 5 Halst. 163.

3. The bank bills alleged to have been the property of the Eastern Railroad Company were not their property at the time of the alleged conversion, so as to be the subject of embezzle-

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ment. They were not the property of the company, while in the bank. *Commonwealth* v. *King*, 9 Cush. 284. *Rex* v. *Walsh*, Russ. & Ry. 215. The defendant was not bound to pay them over to the company *in eadem forma*. Rosc. Crim. Ev. (2d ed.) 449. *Rex* v. *Taylor*, Russ. & Ry. 63, and 3 Bos. & Pul. 598. At common law, for criminal purposes, the mere possession of the servant was not the master's possession, and gave him no ownership. 2 East P. C. 568. *Commonwealth* v. *King*, 9 Cush. 288. The English statutes on the subject of embezzlement recognize and provide for this doctrine. Sts. 33 H. 6, *c.* 1; 21 H. 8, *c.* 7; 15 G. 2, *c.* 13, § 12; 17 G. 3, *c.* 56; 39 G. 3, *c.* 85; 7 & 8 G. 4, *c.* 29, § 47. 2 East P. C. 560, 574. 1 Hale P. C. 515. The St. of 1834, *c.* 186, § 1, contained the same recognition and proviso. The revised statutes omit that proviso, and leave the question of ownership just as the common law left it. Rev. Sts. *c.* 120, §§ 27, 29. *Commonwealth* v. *Stearns*, 2 Met. 343. *Commonwealth* v. *Libbey*, 11 Met. 64.

4. The judge erred in admitting evidence of other alleged embezzlements, committed by the defendant from one to six years prior to that charged in the indictment, even for the purpose of proving the intent of that specific act. Rosc. Crim. Ev. 81. 1 Greenl. Ev. § 52. 1 Phil. Ev. (7th ed.) 178. Foster, 245. 2 Russell on Crimes, (7th Amer. ed.) 772. They were independent acts, and not "parts of one continued or continuous transaction;" *Regina* v. *Bleasdale*, 2 Car. & K. 765; *Rex* v. *Voke*, Russ. & Ry. 533; *The King* v. *Ellis*, 9 D. & R. 174; *Commonwealth* v. *Wilson*, 2 Cush. 590; Best on Ev. 32, 96, 97, 285, 286; nor "intermixed" with the act charged; *The King* v. *Wylie*, 1 New Rep. 92; nor "essential links in a chain of facts needful to be proved" in the case on trial; *Rex* v. *Salisbury*, 5 Car. & P. 155; 2 Russell on Crimes, 776; nor a wholesale joinder of contemporaneous offences; *Rex* v. *Mogg*, 4 Car. & P. 364. Evidence of other acts with considerable latitude of time is admitted in cases of forgery and counterfeiting to prove the guilty knowledge, but never to prove the intent, for in those cases intent is an intendment of law. *Regina* v. *Marcus*, 2 Car. & K. 356. *Regina* v. *Hill*, 8 Car. & P. 274. *Regina* v. *Cooke*,

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8 Car. & P. 582. *Rex* v. *Mazagora*, Russ. & Ry. 291. And see *Burton* v. *State*, 18 Ohio, 221. But even to prove knowledge, three months is the longest recorded period. *Rex* v. *Ball*, Russ. & Ry. 132. *Regina* v. *Oddy*, 5 Cox C. C. 210, and 2 Denison, 264. *Rex* v. *Smith*, 2 Car. & P. 633. These facts were not part of the defendant's confession. *The Queen's case*, 2 Brod. & Bing. 297. *Rex* v. *Jones*, 2 Car. & P. 629. Rosc. Crim. Ev 55, 81. *Willis* v. *Bernard*, 8 Bing. 382.

5. The rulings of the court in regard to the defendant's intent and purpose at the time of the alleged conversion amounted to an instruction that every conversion made without formal claim of right is a fraud, and that from this conversion the intent to defraud must be inferred. Every conversion of corporate funds by its treasurer is not fraudulent; for he may take such funds and secrete them without embezzlement; and do this with a fraudulent intent and yet not be guilty of embezzlement. Rev. Sts. *c.* 126, § 29. Mere taking or conversion, then, is an act indifferent in itself. In such cases criminal intent is not implied by law; but the intent must be proved and found. *Rex* v. *Woodfall*, 5 Bur. 2667. Where the actual effect of the act is to defraud, the jury may infer intent to defraud. Rosc. Crim. Ev. 21, and cases there cited. But intent must always be proved as well as every other material fact charged, either by evidence or by inference of law. 3 Greenl. Ev. § 13. Where fraud and injury must necessarily follow the act, as in forgery, the intent may be presumed from the act itself. *Rex* v. *Farrington*, Russ. & Ry. 207. *Regina* v. *Philp*, 1 Moody, 263. Rosc. Crim. Ev. 20, 21. The ruling of the court excluded all evidence of intent. *Regina* v. *Phetheon*, 2 Car. & P. 552.

6. The defendant's prayers for instructions should not have been refused. One doctrine involved in them, and overruled, is that there was and can be no embezzlement, because there was no demand of the money, no denial of the receipt of it, and no false account given. *Rex* v. *Jones*, 7 Car. & P. 833. *Regina* v. *Creed*, 1 Car. & K. 63. *Rex* v. *Hodgson*, 3 Car. & P. 423. *Rex* v. *Smith*, Russ. & Ry. 267. Another doctrine involved in one prayer, and overruled, is, that in every embezzlement there must

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be some false entry, or false statement, or an express or implied refusal to account. *The King* v. *Taylor*, 3 Bos. & Pul. 596. *Rex* v. *Hall*, Russ. & Ry. 463.

G. W. Cooley, (County Attorney,) for the Commonwealth.

MERRICK, J. The defendant was tried in the municipal court upon a charge of having committed the crime of larceny by the embezzlement of money which came into his possession and was under his care by virtue of his employment as the treasurer of the Eastern Railroad Company. This transaction consisted in the alleged fraudulent conversion of five thousand dollars belonging to that corporation, drawn from the Merchants' Bank on the 26th of June 1855 by a check for that amount signed by him in his official capacity. The jury returned a verdict that he was guilty of embezzling bank bills to the amount and value of two thousand dollars, in manner and form as set forth in the indictment. To many of the rulings of the presiding judge he alleged exceptions; and the questions of law to which they relate are now before this court for revision and final determination.

1. One of these exceptions lies at the foundation of the prosecution against the defendant. It rests upon the denial that at the time of the alleged embezzlement he was in any such employment, or held any such office, as would enable him to commit the offence. In one of the prayers for special instructions to the jury, the judge was asked to rule, that the treasurer of the Eastern Railroad Company, in regard to money and funds under his control and administration, including such funds as were deposited or drawn on the 26th of June, was not such an officer or agent of the corporation that an indictment alleging embezzlement of its property could be maintained against him. If this rule had been adopted by the court, it would necessarily have ensured the acquittal of the defendant; for it asserts that the provisions of § 29 of *c.* 126 of the Rev. Sts., under which he was indicted, is inapplicable to any person holding the office of treasurer in a railroad corporation; and that no misappropriation, or conversion to his own use, of the money or property intrusted to him in his official capacity, however fraudulent or

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dishonest, and with whatever intent or purpose it may have been done, would or could constitute the crime of embezzlement. But the court declined to accede to this request of the defendant, and on the contrary ruled that the prohibition and penalties of this section of the statute extended to such officers, and that they were clearly embraced in the terms in which its provisions were expressed.

In the argument of the counsel in support of the exceptions no great reliance was placed upon this objection. Indeed we are not sure that it was not their purpose to waive it altogether. But we do not feel at liberty, in a matter of so great importance, wholly to overlook and disregard the objection on this ground alone, since if it could be maintained it would be fatal to the prosecution.

That part of the statute under which the defendant is indicted provides that if any officer, clerk, agent or servant of any incorporated company shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle or convert to his own use, without consent of his employer or master, any money or property of another which shall have come into his possession, or shall be under his care, by virtue of such employment, he shall be deemed by so doing to have committed the crime of simple larceny. Rev. Sts. c. 126, § 29. The treasurer of a railroad company is an officer distinctly recognized by law. He is to be chosen by the directors, and is required to give bond for the faithful discharge of his trust in such sum as the by-laws of the company shall require. Rev. Sts. c. 39, § 49. Being therefore within the very words of the statute, he must be considered as liable to the penalties prescribed for its violation, unless upon some reasonable principle of interpretation he is not to be accounted as one of the several parties against whose misconduct it was the object of the legislature to provide guards and security. It would certainly seem, not less from the course of legislation on the subject, and the mischief to be provided against, than from the literal meaning of the words of the statute, that the treasurer of a railroad corporation is comprehended in one of the classes of persons who, by a fraudulent conversion of prop-

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erty entrusted to their care, are to be deemed to have thereby committed the crime of larceny. The twenty-ninth section of *c.* 126 of the Rev. Sts. is a reënactment of the provisions of the St. of 1834, *c.* 186. But there is one significant and decisive change in its phraseology. While the former is only in general terms, the revised statutes mention particularly the "officers and agents of any incorporated company" as parties to whom its provisions shall extend. They were specially mentioned probably to remove any doubt which might be entertained upon the question whether they were embraced in the more general language of the former statute. The commissioners by whom the revision was made do not appear to have intended to enlarge or change the class of persons by whom embezzlement might be committed. Nothing of that kind is alluded to in their notes. Commissioners' Report of 1835, *c.* 126. This specific change in the language of the former statute only makes it certain that every officer of an incorporated company, to whose care property is entrusted by his employer, occupies a position in which he is to be considered capable of committing acts of embezzlement, and liable to the penalties which the law has assigned as the punishment of the offence.

The only consideration which has ever, as far as we know, been suggested as having a tendency to show that upon a true interpretation of the statute treasurers of incorporated companies are not comprehended under the general term of "officers" who are made liable to its penalties is, that on account of their peculiar employment and the nature of the duties they are required to perform, they are necessarily themselves the masters of all the property of which they come into the possession or have the care, and that they cannot therefore either embezzle, secrete or fraudulently convert it without the consent of their employer or master. This is a mistake; no such difficulty exists. To some extent it is true that a treasurer, being a keeper of cash and responsible for it, has for the time being the exclusive right of possession, control and disposal. Unless he is restrained by some rule prescribed for the government of his official conduct, or by the orders of those to whom in the dis-

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tribution of the powers and duties of the corporation for whom they all act he is made subordinate, he may keep the money, of which he obtains possession by virtue of his office, in the manner and in the place which he shall himself prefer — in any place where under a sense of his responsibility he may consider it, however erroneously, the most secure and the most readily available for any purpose to which those to whom it belongs shall devote it. But in doing this he is only executing a trust. He is not managing anything which is his own, but only controlling, within the legitimate limits of his official authority, for the benefit of the owner by whom he is employed, the property entrusted to his care. And in this particular, excepting merely the kind, and it may be the value, of the property respectively possessed, his powers, duties and obligations do not in the least degree differ from the powers, duties and responsibilities of the clerks, agents and servants of the same employer. They are severally, for the time which they hold possession of anything committed to them to keep, as much masters of it, as he in the same sense is master of the money with which he is entrusted. Both and all of them are to act, in their several relations, with strict fidelity to their employer; and every species of property is to be kept by them respectively upon the terms and according to the directions given them concerning it. The clerk who has the custody of books and papers, the agent to whom is given the general control of all the effects of his principal, the servant who in a more limited sphere is entrusted with goods for any specific purpose, has each within the circle of his authority a right of control as clear and absolute as that of the treasurer in the discharge of the duties which devolve upon him in a higher and more responsible department of service. They are therefore all alike included in the scope and purposes, as well as in the literal meaning of the comprehensive words of the statute. And surely, if there be any reason to discriminate between different ranks and classes of service, to no one of all those who may be in the employment of a corporation, of copartners or of individual proprietors, can there be a higher reason or more stringent occasion for applying the

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restraint of penal laws to insure fidelity than to him who is specially entrusted with the care of money. Of every species of property, this is the most easily concealed, misapplied, converted to use and embezzled. Being at all times available for the purposes either of business or of pleasure, it presents more than anything else a temptation to misuse. Whether therefore the mischiefs to be guarded against, the temptations to be restrained, or the express words of the statute, are considered, it is equally apparent that treasurers of railroad corporations, as well as of other bodies politic, to whose care any kind of personal property is specifically entrusted by their employers to be kept for them, are to be accounted officers, within the meaning of that term as it is used in the particular section of the statute prescribing the punishment of embezzlement.

2. As we thus find that the defendant occupied a position in which he was capable of committing the offence charged against him in the indictment, we are brought to a consideration of the several rulings of the presiding judge which are complained of as erroneous.

In the first place the defendant insists that all the evidence concerning the confessions supposed to have been made by him to John B. Parker and to Samuel Hooper, which was produced by the government in support of the prosecution, ought, upon his objection thereto, to have been rejected, because they were not, in a legal sense, voluntary confessions, but were evoked from him by promises of favor, held out to induce him to acknowledge himself guilty of embezzling the money of his employers. If he was right in the fact which he thus alleged, there can be no doubt that the objection which he predicates upon it ought to have been allowed to prevail; for no legal proposition is better established than that upon which the objection rests. It is certainly a clear as well as familiar principle of law, that every free and voluntary confession is admissible in evidence against a party accused of any criminal offence; but that all those which are obtained from him by threats of harm, or promises of favor and worldly advantage, held out by a person in authority, or standing in any relation from which the law will

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presume that his communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals. This is in conformity with the whole current of authorities on the subject. 1 Greenl. Ev. § 219. *Commonwealth* v. *Knapp*, 9 Pick. 507, and 10 Pick. 489. 2 Bennett & Heard's Lead. Crim. Cas. 184 *& seq.* Rosc. Crim. Ev. 29. Doubts have sometimes been expressed both as to the expediency of the rule, and the extent to which in particular instances it has been allowed to be carried; but no one thinks of breaking in upon or attempting to disturb it. *Regina* v. *Baldrey*, 5 Cox C. C. 523. "The ground," said the chief justice of this court, "on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted." *Commonwealth* v. *Morey*, 1 Gray, 462, 463.

It does not appear from the bill of exceptions that any doubt whatever was entertained by the court, upon the trial of the defendant, concerning his right to have the full benefit, advantage and protection of this rule of law, or that any controversy arose or existed concerning it. But there was a question of fact which was debated by the parties; and this was, whether the communications of the defendant to Parker and to Hooper were free and voluntary disclosures, or were drawn out by promises of favor held forth to induce him to make an acknowledgment of his guilt. In relation to the testimony of Parker, it is distinctly stated in the bill of exceptions that the court determined that the facts disclosed by Reed were insufficient to exclude the proposed evidence of the defendant's confessions upon the ground that they were made under the influence or in consequence of any promises of favor. And although nothing is specially said upon this subject in relation to the testimony of Hooper, we think it is very ap-

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parent that it was held to be admissible solely upon the ground that there was no sufficient proof before the court of any such antecedent promises as would justify its exclusion. Indeed, all this is substantially conceded; for in the argument in support of the exceptions it was not suggested that there was any failure on the part of the court to recognize this principle of law, or any refusal to apply it in what was admitted to be a proper case, but that it was erroneously determined upon the evidence that no promises of favor were held out to induce the confessions of guilt upon which the government relied in support of the prosecution.

The question then recurs whether that adjudication was correct. This is to be determined upon a consideration of the evidence which was before the court when that question arose, and cannot be settled by a mere reference to judicial authorities. These can only supply the principle of law which is to constitute a uniform standard of decision; but in every case the admissibility in evidence of confessions must depend upon the peculiar state of facts and circumstances under which it is offered.

To show that the confessions of the defendant to which the testimony of Parker relates were not free and voluntary communications, but were educed from him under the pressure of hopes excited by promises of favor, the defendant relied at the trial, and still relies, upon the facts disclosed by Reed in his examination upon the preliminary question. It appears from this examination that on the evening of the 27th of June 1855 the defendant went, in company with his wife, and certainly after consultation with her in relation to the objects of his visit, to the residence of his friend Reed in Lynn, to make a disclosure of the trouble in which he was involved, and to solicit advice concerning it. After he had, in language the substance only of which is stated, admitted that he was a defaulter in his official capacity as the treasurer of the Eastern Railroad Company, Reed said to him that "he had better go to the directors and make a clean breast of it;" "that it would be for his interest to go and confess all;" "to go and make a full confession;" that "he had better go and make a clean confession and

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a clean breast of it." It is insisted that these expressions, to which it appears that Reed repeatedly gave utterance, were calculated to encourage the defendant to confess, to excite in his mind hopes of relief and advantage if he yielded to that advice; and that he must have considered them to be, and that they were in fact, promises of favor held out as inducements to influence him in the course of conduct he should pursue. Such might, and perhaps would, be the necessary and legal consequences of these exhortations of Reed, if they were to be considered without reference to the circumstances under which they were made, and to whatever else was said at the same time, tending to limit, explain and qualify their meaning. The accompanying circumstances are never to be lost sight of in determining whether proof of confessions alleged to have been made shall be received. Thus, if an accused party has been made a prisoner, anything which may be said to him by the officer by whom he is held in custody will always be scrutinized with the greatest care, and slight promises of favor coming from him will be considered a sufficient reason for rejecting all proof of subsequent confessions. *Commonwealth* v. *Taylor*, 5 Cush. 605. But the defendant was not under arrest, and no charge had been brought or complaint made against him at the time of his interview with Reed. From the responsible position which he occupied, as the treasurer of a great railroad corporation, it is impossible not to regard him as a person possessed of at least the ordinary degree of intelligence, and quite capable of appreciating the force and effect of the whole conversation which then took place. And in looking at the bill of exceptions, it is very plain that, in addition to the expressions which have already been quoted, much was said by Reed by which they were materially qualified. Thus he states that he "said nothing, in terms, of a prosecution;" that he told the defendant "to commit no violence on himself, nor run away; that the disgrace was in doing wrong, not in suffering punishment for it; he had better stay and meet the punishment;" and finally, that he "advised the defendant as a friend and as a son." Now it is impossible, taking all this together, to consider that any prom-

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ise of favor was held out to the defendant as an inducement to confess his guilt. But there was a consultation between the parties; and the defendant, at the conclusion of their conversation, obtained all that he went to solicit from his friend. It was advice how he should conduct himself in the emergency into which he had fallen, that he particularly sought for; and that advice was given generally, upon the broad ground of right and expediency; and though pressed with an earnestness corresponding with the importance of the occasion, Reed did not presume to accompany it with any assurance of protection or any promise of favor or relief. And it was obviously understood in this light by the defendant; for at that time he declined to reply in any detail to the inquiries which were urgently, though kindly, pressed upon him; and he reserved to a future occasion the determination whether he would make the frank and full communications to which he was exhorted. This was all the evidence, when the testimony of Parker was offered, which was before the court to show that any promise of favor had been made or held out to the defendant; and as it fails to prove that fact, it was rightly held that there was no sufficient ground upon which it could be excluded.

Nor does it appear from the testimony of Hooper that, previously to making those confessions to him, which the government proposed to put in evidence, any promises of favor or assurances of safety or relief had been held out to the defendant to bias or disturb his judgment, or to influence his conduct or course of action. When they met in the morning after the interview with Reed at the office of the latter, Reed urged the defendant to make a full confession; tried very hard to make him do so; and amongst other things said that Hooper had influence with the directors, and would see that he was not complained of or arrested. But here Hooper interposed, and told Reed to stop, and declared that he would make no promises whatever. And although he afterwards said to the defendant, that he had no vindictive feelings towards him, and intended to do whatever was right and proper for him to do to prevent his arrest or the institution of a prosecution against him; yet he cautiously and repeat-

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edly added, that he did not know the extent either of his power or of his duty; but that at all events he would enter into no stipulations with or make any promises to the defendant, who, in revealing or fully developing the particulars of his defalcations, must confide wholly in him; and that he should in every respect, without embarrassing himself by any previous engagements, do precisely as his own judgment and discretion should direct him. This is too clear and explicit to admit of any doubt, either as to what was said, or as to the import and meaning of what was said. Not only were no promises of favor made; but the defendant was repeatedly warned, in substance, that none would or could be made, and that he must decide for himself whether he would disclose or withhold the information he was desired to communicate. He afterwards did confess, and gave to Hooper for the directors a detailed written statement of the various sums of money which he had on different occasions abstracted from the company's treasury; not, as there is any reason to suppose, under the influence of a promise of favor which had, or which he supposed had, been made to him; but rather in a confidence entertained in his own mind, and probably well founded, that what he might do in future would mitigate the resentment or disapprobation of those whom he had injured, and thus secure to himself protection and relief. The judge determined, and we do not see how he could have come to any other determination, that evidence of the confessions which ensued was admissible.

3. The defendant further excepted, and now objects, to the ruling of the presiding judge, that, if money which belonged to the Eastern Railroad Company was deposited in the Merchants' Bank by the defendant to his own credit as treasurer of the corporation, and he afterwards in that capacity drew his own check upon the bank therefor, and received the amount of it in bills, those bills, while in his hands as treasurer, were the property of the corporation, and might be embezzled by him. And this objection is attempted to be supported upon two grounds: first, that the defendant, though bound by law to apply that amount of money to the use and service of the corporation, was not

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required absolutely to apply those identical bills for that purpose; and secondly, that the relationship between him and the corporation was such that his possession gave them no ownership of the money or coin which he drew from the bank. As to the first of these reasons, it may be assumed as true that, if unrestrained, as in this instance he appears to have been, by positive instructions on the subject, the treasurer might lawfully change the money which came into his hands, whenever and as often as he should choose to do so; but the consequence contended for by no means follows from the exercise of that right or privilege. The change of one parcel of bank bills for another parcel, or for their equivalent value in any species of currency, can have no effect upon the rights of the parties in relation to the question of ownership; for of whatever the money, which for the time being is in the hands of the treasurer of a railroad company and held by him on their account, may consist, it always, and in every shape, belongs to his principals. He is at all times the keeper of their property, and never, whatever its form may be, can rightfully set up any claim of ownership to it in himself, in opposition to them. He cannot cease to hold it in trust, so long as he holds it at all. Here it is admitted, in the very terms in which the exception is stated, that the money which was deposited in the bank belonged to the corporation. They had therefore a perfect right to draw and use the amount deposited as their own; and it could be drawn only upon the order or check of their treasurer. When it was so drawn, the bills received could no less be theirs, than were the bills or coin placed on deposit, and for which by this course of proceeding they would have been virtually exchanged. And this shows that there is no foundation for the second reason urged in support of the exception. The relationship of the parties to each other is not that of debtor and creditor; nor does it arise from a contract that one of them shall collect and receive money belonging to the other, and thereupon account for and pay it over to him; or that one shall pay over to the other the proceeds of property which he has been authorized and employed to sell for the owner; as in the cases of *Commonwealth* v. *Stearns*, 2 Met. 343, and *Com-*

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monwealth v. *Libbey*, 11 Met. 64, cited by the counsel for the defendant. But, more than this, he is exercising a trust which is not only faithfully, but specifically, to be observed and kept. As an officer of the corporation, whose especial duty it is to hold, manage and control their funds, whenever money belonging to his principals comes into his possession, he must hold it in his fiduciary character, having no further right to or interest in it than that which is sufficient to enable him to discharge his duty to the owner by whom he has been intrusted with its possession. The ruling of the court upon this subject appears therefore to have been perfectly correct.

4. The next exception of the defendant is founded upon the general and well established rule that in all trials, and especially in every criminal trial, the evidence must be confined to the proof or disproof of the precise point in issue. And it is undoubtedly true that the prosecutor is commonly to be restrained from proving the commission by the accused of other distinct offences, for the purpose of showing that he is guilty of that which is specially charged against him. The defendant objects that this rule, which was of the greatest practical importance to him, was directly disregarded upon his trial; and that if it had been properly enforced, all the evidence which was admitted respecting acts of alleged embezzlement of property belonging to the Eastern Railroad Company, other and distinct from those set forth and charged against him in the indictment, would have been excluded.

To form a correct opinion upon the question whether this evidence was admissible, it is necessary to take notice, in the first place, that it was confined to a special and designated class of facts, having, as it was alleged, and as it was understood by the court, a peculiar and intimate, if not also an inseparable, connection with, and tending to explain and characterize, the material act in issue which was charged against the defendant; and secondly, that it was allowed to be laid before the jury for the sole purpose of showing that the money alleged to have been embezzled was taken and appropriated by him with a fraudulent intent. The counsel for the government proposed to enter upon

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a much broader field of inquiry, and to prove, without limitation, the commission of distinct and independent acts of embezzlement during the period between six months and four years next preceding the commission of the act charged in the indictment. But he was not allowed to do so. In the strict application of the rule, that no evidence inapplicable to the precise point in issue is admissible, all the proofs which he offered in relation to those remote and independent facts were rejected. But there was another class of facts of an entirely different character. It had already appeared in the progress of the trial, from the testimony of Hooper, that the defendant, in giving an account of his dealing with the funds of the corporation, produced and delivered to him a detailed statement in writing of the various sums of money which he had, after receiving them in his official capacity, wrongfully abstracted from the treasury, and for which he was then a defaulter. This paper had been produced in evidence. One of the items found upon it was the same sum of $5000, the embezzlement of which was set forth and charged against the defendant in the indictment. This item and all the items contained in the paper were explained by him to Hooper to be a statement of the different amounts of the property of the corporation which he had appropriated to his own use. All these various circumstances appeared to the court below to have a tendency to prove that the misappropriation of this sum of $5000 was one of a series of connected transactions, and that the whole series would tend to show the intent of the defendant in doing the particular act which is made the subject of accusation against him in the indictment. There may be a difference of opinion as to the effect of this evidence, of the inferences to be drawn from it, and of its sufficiency to prove the occurrence of a series of connected transactions, and the guilty intent of the defendant in them all, which it was the object of the government to establish by its introduction. But it is enough that it had a tendency to show these important facts. The intent and purpose of the defendant, in the withdrawal of the sum of $5000 from the treasury of the corporation, and in the disposal and appropriation which he made of it, was an essential matter

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of inquiry in relation to the issue to be tried. His alleged guilt consisted not merely in the conversion of the money, but in its fraudulent conversion to his own use. Hence it was competent for the government to introduce evidence of any facts tending directly to show his fraudulent intent, or from which that intent might justly and reasonably be inferred. It was in this view, that the government was permitted to lay before the jury proof of the embezzlement by the defendant of the several sums of money mentioned in the written statement which constituted a part of his confessions to Hooper. In relation to each and all of these several sums of money, if his conduct, motive, purpose and intent ought not to be considered to be by him confessedly of the same character, yet it is clear from the testimony of Hooper that, in the full explanations afforded in the course of his confession, the defendant himself did not indicate or suggest any distinction between them, but brought them all together in one general statement of his defalcations. If his intent in relation to all of them was precisely the same, then if in reference to any of them it was shown to be fraudulent, all would be shown to be fraudulent, and thus a particular fact material to the issue would be satisfactorily established. Considered in this aspect, it will be seen that the admission and exclusion of all the evidence, produced or offered by the government concerning transactions other than those mentioned in the indictment, were both regulated, not in disregard, but in strict recognition, of the rule requiring it to be confined to the proof or disproof of the point in issue. Thus all the proof which was offered in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence, or in necessary explanation of the evidence, adduced to establish it, was carefully rejected. But, on the other hand, transactions which had that intimate connection were permitted to be shown, because they tended to develop and expose the fraudulent intent of the defendant in converting to his own use the $5000 which he is charged in the indictment with having embezzled, and thus to sustain one of its essential allegations. This was perfectly right. Where the intent of the accused party forms any part

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of the matter in issue, evidence may always be given of other acts not in issue, provided they tend to establish the intent imputed to him in committing the act. Rosc. Crim. Ev. 71. The same proposition is stated, though in somewhat different language, by Archbold. Archb. Crim. Pl. (10th ed.) 112. This rule is always recognized. It is uniformly acted upon in criminal trials, whenever an occasion arises for its application.

Thus where a party was tried upon an indictment for the crime of adultery, evidence of three instances of improper familiarity between the prisoner and his supposed paramour, one of which occurred within a fortnight and the others within a year next preceding the particular act complained of, was held to be admissible; and this manifestly for the purpose of showing the intent of the parties when they met in secret, so that no direct evidence of their conduct there could be expected to be produced. And in delivering the opinion of the court, it was said by Putnam, J.: "Evidence should be excluded which tends only to the proof of collateral facts. But it should be admitted if it has a natural tendency to establish the fact in controversy." To which he immediately adds: "It was argued that the defendant was not to be put upon his trial for every act of his life, but for a particular offence. Be it so; if the evidence which was received has a natural tendency to corroborate other direct evidence in the case, it would seem to be clearly admissible." *Commonwealth* v. *Merriam*, 14 Pick. 519, 520.

In the case of *Commonwealth* v. *Eastman*, 1 Cush. 216, this principle of law was not only fully recognized, but its decision afforded an opportunity for a clear exposition of the occasions upon which it may be availed of, and of the reason upon which it is founded. The defendants were indicted for obtaining goods and merchandise, by false pretences, of certain persons named in the indictment. On the trial evidence of purchases of goods from other persons, under circumstances similar to the transactions charged in the indictment, was offered in support of the prosecution. It was objected to, but admitted. In stating the opinion of the court, after an elaborate argument by the counsel for the defendants, it was said by Dewey, J.: 'This species

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of evidence would not be admissible for the purpose of showing that the defendants had also committed other like offences; but simply as an indication of their intention in making the purchases set out in the indictment." "Such evidence is always open to the objection that it requires the defendant to explain other transactions than those charged in the indictment; but when offered for the limited purpose of showing a criminal intent in doing the act charged in the indictment, it has always been held admissible." See also *Commonwealth* v. *Miller*, 3 Cush. 250.

These authorities abundantly establish the principle contended for on the part of the government. It is not indeed denied by the counsel for the defendant; but the objection urged to the admission of evidence concerning other acts of embezzlement beyond that immediately charged in the indictment rests wholly upon the rule that it ought always to be confined to the precise point in issue. But in the position of the case, when during the progress of the trial evidence of some such transactions was offered, the government had become entitled, not in disregard or in violation of that rule, but upon another distinct principle, to avail itself, to the extent which was authorized by the court, of proof concerning those particular transactions which the defendant by the manner and form and peculiarity of his confessions to Hooper had made pertinent, if not indeed indispensable, to a true exposition of his intent in using the particular sum of money alleged in the indictment to have been embezzled. The evidence was therefore properly admitted.

5. In reference to the general crime of embezzlement, the jury were instructed, that if the defendant, acting as treasurer, took the money of the corporation which had been entrusted to him, and used it for his own purposes, knowing that he had no right to do so, and did it without the consent of the company or of any of its officers, and concealed the transaction from them, this amounted to a fraudulent conversion of the money of the company, even though at the time of taking it he intended to restore what he had so appropriated, before the appropriation should become known to its owners, and believed that he should be

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able to do so, and had in his possession property to secure the full amount of the property so taken. This instruction is objected to by the defendant for the assigned reason that it amounts to a statement, that every conversion made without a formal claim of right is a fraud; and that from any and every conversion fraud is necessarily to be presumed; and that therefore the question whether the defendant was actuated by a fraudulent intent was substantially and improperly withdrawn from the consideration of the jury.

Embezzlement of property by officers, clerks, agents and servants is fully defined by the statute, which creates the offence and provides for its punishment. A fraudulent intent is made a constituent and an essential part of the offence. Without it there may be misconduct, but there will be no criminality. The question therefore whether any particular act of conversion was infected or accompanied by a fraudulent purpose is a question of fact to be passed upon by the jury. But the submission of that question to their determination ought to be accompanied with suitable instructions in the matters of law which pertain to it. This being done, it may be sufficient to leave them to find whether there was or was not any fraudulent intent, in the legal sense and meaning of that phrase, and according to the definition of it which may have been given to them; or whether they are reasonably satisfied of the truth of certain enumerated facts and circumstances from which a fraudulent intent, is a direct and inevitable inference. It is very plain that the latter was the course pursued upon the trial in the present case. For although in one part of his charge the presiding judge stated most explicitly that to establish the charge against the defendant the government must make out a fraudulent taking and conversion, and explained satisfactorily the nature of fraud and in what it consists, yet in conclusion the jury were advised that the actual conversion by the defendant to his own use of money belonging to his employers, which they had entrusted to him in his official capacity, doing this without their consent, and knowing that he had no right to do it, and concealing it from them, would amount to a fraudulent conversion. The question therefore, plainly

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stated, is, whether from the facts and circumstances to which the attention of the jury was thus called and directed a fraudulent intent in the taking and conversion of the money is the only just and reasonable inference which can be deduced. In fraud there is always some kind of deception. And a fraud may be defined to be any artifice whereby he who practises it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty. All these elements and characteristics of fraud are embraced in the hypothesis which was put to the jury, and upon which the final instructions given to them, and now objected to, were founded. The appropriation to his own use by the defendant of money belonging to the corporation, which came into his possession by virtue of his office and employment, and was thus entrusted to his care, was an unlawful act. It was a breach of trust; and, upon the supposition that he well understood that he had no right so to dispose of it, was a wilful violation of his duty. He unjustly gained thereby an undue advantage to himself in the accomplishment of objects purely selfish and personal, by applying to his own individual purposes the property of others, which he ought faithfully to have kept and preserved exclusively for them. He committed a wrong against his employers by secretly substituting his own mere personal credit and liability in the place of the specific property which they had entrusted to his care, and thus subjected them to a risk and hazard of loss which they had never consented or intended to assume. And by concealing the transaction from their knowledge, he practised upon them a preconceived and intentional deceit. For concealment, in the connection in which it was spoken of by the court, necessarily imports the execution of some plan previously arranged, or of some design which had been cautiously premeditated. This is not merely that he was still and silent, or omitted to publish or disclose what he had done; but involves by necessary implication the idea, that he had deliberately resorted to the active employment of means,

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which he believed would be effectual for that purpose, to secrete and hide from his employers the fact of his defalcation, in order that he might escape with impunity from its consequences. How, or in what manner, he effected that concealment, or whether any evidence was adduced upon the trial, which would warrant the conclusion that it was in fact in any way effected it is not now material to consider or inquire. It might have been by false entries upon the books of the corporation, or by the failure to make any entry upon them at all; or by representations known to be untrue; or by any device resorted to for the purpose of disguising the truth from the knowledge of his employers, and thus inducing them to rest in a false security. All these were proper subjects of inquiry and investigation upon the trial before the jury. We are confined here to the question whether the rule of law which was laid down for a guide to them in their deliberations was correct. And in this point of view it is obvious that the actual use of means in conformity to some scheme devised to conceal the unlawful appropriation of their money from his employers directly imports and evinces a purpose to mislead and deceive them. But no single circumstance is alone to be taken into consideration. The several acts enumerated as parts of the hypothesis upon which the instructions to the jury were predicated, embracing the conversion by the defendant of the money of his employers, the known violation of duty thereby, the evident advantage gained for himself, the injury inflicted upon his employers, and some of these objects accomplished by artifice and deception voluntarily practised, were respectively unlawful; and taken altogether as one general fact, though consisting of several, but a connected series of, transactions, they constitute an act of positive fraud. And he by whom these acts were done must be presumed to have contemplated and intended the natural and probable consequences of his own well understood misconduct. And since the intention by which a party is actuated in any particular transaction must be presumed to participate in the nature of that transaction and of the various acts by which it is consummated, the inference must be inevitable that

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the perpetrator of a fraud commits it with a fraudulent intent. This result shows that the law was rightly stated and explained in the instructions to which exception is taken. These instructions were predicated upon the facts embraced in the hypothesis laid before the jury; and as the doing of the acts therein mentioned was fraudulent, the motive and intent with which they were done were fraudulent also.

This result cannot be affected by the consideration, if it be admitted to be well founded, that the defendant, at the time of taking and converting the money to his own use, intended to restore it to the owners before his appropriation of it should become known to them, and believed that he should be able to do so, and had in his possession property to the full amount of the money which was taken. The intention to take, and the intention at some future time to make restitution, may be two different operations of the mind, just as the taking of money at one time and the repayment of it at some subsequent period are two distinct transactions. But even if it can be supposed that these two purposes, having in view the accomplishment of objects entirely distinct from each other, may be so blended together, by being contemplated at one and the same moment, as to be absolutely inseparable, still it is undeniable that the execution of them can be worked out only by successive acts, with some intervening space of time between them. The abstraction must necessarily precede the restitution. The first will be complete before there is a possibility of commencing the act by which it is to be followed. And thus, whatever it may be the purpose of a guilty party ultimately to do, the offence prohibited by the statute will already have been consummated whenever, after the commission of all the other acts of which it consists, a fraudulent conversion of property shall have actually taken place. And even if it be necessary to go the length of affirming that there can be no embezzlement except where money or property is taken with an intention never to return to the owner that which is taken, the actual use and conversion of money will cover and comprehend that proposition. For as an entrusted agent, servant or officer can convert to his own use the

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money of his employer only by passing it out of his hands and delivering it with the right of property to some other person, since, so long as he remains in possession of it, it will continue to be the specific property of his principal, he necessarily loses all control of it by such an unlawful conversion, and can never afterwards by his own mere power and motion bring it back. The past is complete and unchangeable; and as to the future he is dependent upon the will of others and upon circumstances over which he cannot exercise an absolute control. The intention to abstract the money and appropriate it to his own use has been fully executed; the intention to indemnify and do justice to the party from whom it has been withdrawn remains unexecuted, and may finally, however conscientiously entertained, be altogether defeated. Conversion bears nearly, if not quite, the same relation to embezzlement, as asportation does to the crime of larceny. Yet no one would doubt but that the commission of the latter crime would be fully consummated if a person, possessed of abundant means to afford and ultimately to insure a complete indemnity to the owner of stolen property, if applied to that purpose, should, under the pressure of some present necessity for money, go furtively into his neighbor's shop, and carry away from there a parcel of coin or bank bills found there, although the act were accompanied with an intention to return as much at an early, but yet at a future, day, to be put in its place before the money should have been missed or the trespass become known. That which must always qualify and characterize the act is the intention of the party when he takes or converts to his own use the property of another person. If the intention be to use and enjoy the thing taken for some brief period, and then to abandon or restore it to the owner in the identical form and condition in which it was taken, a trespass only may have been committed, however unjustifiable were the means by which the possession of it was acquired; but if the intention be, feloniously in the one case, or fraudulently in the other, to make a full and entire appropriation to his own use, and thus absolutely to deprive the owner of his property, the act, whether of asportation or of conversion, will be criminal,

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and is not to be excused or justified by any resolve, however honestly entertained, to make restitution at some future, but indefinite period.

It was in conformity to the principle, thus developed, that the instructions to the jury which are complained of were framed and accurately stated. They were to find the conversion of the money taken by the defendant from the treasury of the Eastern Railroad Corporation to have been fraudulent, if they found the evidence laid before them sufficient to prove the truth of certain alleged facts from which a fraudulent intent was a legitimate and an inevitable inference. Thus under these instructions it must have been made satisfactorily to appear to the jury, before they could have rendered a verdict of conviction, that the defendant, standing in a relation of trust and confidence to his employers, not only unlawfully and in violation of his duty converted their money, entrusted to his official care, to his own use; but that he did it by artifice and deception deliberately practised, and therefore with a fraudulent intent. These instructions then contained a precise description of one of the acts of embezzlement, which are made criminal by the express provisions of the statute; and they were accurately adapted to the particular accusation set forth in the indictment against the defendant.

6. In addition to the various objections which have now been considered and disposed of, the defendant excepts to the course of proceeding upon the trial, and to the refusal of the presiding judge to rule in conformity to many of the prayers for instruction, which were seasonably presented to the court for its adoption. Instead of adopting them, he gave such instructions as he deemed proper for the direction and guidance of the jury. When, as in the present case, at the close of a protracted trial, many prayers for instruction, voluminous and complicated in their structure, are presented to the court by either or both of the parties, it is within the judicial discretion of the judge to respond to them severally, adopting such parts as appear to be correct, and rejecting the residue altogether; or to explain the law wholly in language of his own. And no cause of complaint is thereby afforded, if all the matters propounded in the various

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prayers are fully adverted to and explained. No complaint of any omission in relation to them is urged by the defendant; but he insists that the court erred in overruling the doctrine, which he says is involved in his prayers for his instructions, that there can be no embezzlement unless there has been a demand of the money alleged to have been embezzled, or a denial of its receipt, or some false account given of it, or a false statement or false entry concerning it, or a refusal to account for it. If the doctrine so stated be fairly indicated and involved in those prayers, it is clear that they were properly overruled, because it is apparent, from the definition already given, that the several circumstances above mentioned do not in fact constitute any part or element of the offence. They are facts and circumstances admissible in evidence as bearing upon the question of a fraudulent intent; but for all other purposes they are wholly immaterial. And this is all that is shown by the several authorities cited by the defendant to support the doctrine supposed to be asserted in his prayers for instruction. Thus it appears in relation to these prayers that both the refusal of the court to adopt them literally as the basis of its instructions, and the substitution of a different definition of the offence charged against the defendant in the indictment, were correct in point of law and obnoxious to no valid objection.

Exceptions overruled.

NATHANIEL PAGE, JR. *vs.* THOMAS MELVIN, Executor.

The *St.* of 1855, *c.* 283, excepting from the operation of the *St.* of 1852, *c.* 294, § 1, (which limited the time of bringing actions against executors and administrators to two years from the filing of their official bond,) any right which had accrued or existed against any deceased person or his executor or administrator prior to its passage, does not revive a right of action barred by the *St.* of 1852 before the passage of the *St.* of 1855.

SHAW, C. J. It appears by the report in the present case that the action is on a promissory note not barred by the general

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statute of limitations at the decease of the testator. The defendant was appointed executor and gave bond on the 12th of April 1854. This suit was brought on the 18th of June 1855, more than two years, but less than four years, from the time when the executor gave bond.

The defendant relied on the statute of limitations of 1852, c. 292, limiting actions against executors and administrators to two years from the time of giving bond. As the defendant in this case became executor and gave bond after the passage of the St. of 1852, and this action was brought more than two years after the defendant gave bond, it would appear that this was a bar. But the plaintiff insisted that it was saved by the St. of 1855, c. 283. This act was passed on the 2d of May 1855, and by its terms took effect from its passage.

Between the times of passing the two statutes, the case of *King* v. *Tirrell*, 2 Gray, 331, had been decided, determining that the St. of 1852 could not so far have a retroactive effect as to apply to cases where administration had been taken and bond given before that statute was passed, and where by operation of preëxisting laws the creditor had four years in which to bring his action. In this state of the law the later act was passed. It is uncertain whether the full and authentic report of that case was then published; but the legislature probably had some knowledge that such a decision had been made.

The St. of 1855, which is very short, provides that § 1 of St. 1852, c. 294, "shall not apply, or be construed to apply, to any right of action of any creditor of the estate of a deceased person against the executor or administrator of such person, which had accrued or existed against such deceased person, his executor or administrator, prior to the passage of said act."

By the case of *King* v. *Tirrell* it was decided that the St. of 1852 could not apply to cases where administration had been taken and bond given before that act passed, because it would be giving it a retroactive operation, which it could not be presumed that the legislature intended. But as that reason would not apply to cases where administration was taken and bond given after the act of 1852 passed, and there was no additional

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statute altering or modifying it, the court assumed that in a case occurring after the statute the two years' limitation would apply. Such application would not give it a retroactive operation; and as an act governing new cases it seemed unobjectionable.

In the present case, administration having been taken and bond given after the act of 1852, the plaintiff endeavored to avoid the two years' bar by relying upon that clause in the St. of 1855, which provides that the act of 1852 shall not apply to any case in which the cause of action accrued to the plaintiff before its passage. There is an obscurity in the clause, which renders it doubtful whether the legislature intended to except a case where the cause of action against the executor or administrator accrued to the creditor, or whether it extended to a case where the cause of action accrued against the debtor in his lifetime.*

But there is no necessity, for the purposes of this case, to express any opinion upon this question, because there is another, free from doubt, upon which the court are of opinion that this case must be decided. Letters testamentary were issued and bond given on the 12th of April 1853. The act of 1852 was then in full force. The two years' limitation expired on the 14th of April 1855, some weeks before the passage of the St. of 1855. The lapse of this term of limitation, as the law then stood, had become an absolute and complete bar to the plaintiff's action against the executor, and the subsequent statute could not so operate as to remove and take away a bar thus complete and absolute. It is no doubt competent for the legislature to enlarge and extend a term of limitations of actions. This was repeatedly done in regard to the general statute of limitations, which was extended, we think, more than once after the time first fixed for it to go into operation. The legislature may also, we think, prospectively diminish and shorten a term of limitation, by a general statute, provided reasonable time is left between the passage of the act and the time when it is to take effect, to enable all persons concerned to bring their actions.

But it has been held, and we think on satisfactory grounds, that where a statute of limitations has taken effect and become

* See *Thompson* v. *Burnham*, 13 Gray, 211.

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a bar, a subsequent alteration of the law of limitation will not operate retroactively so as to remove such bar. *Wright* v. *Oakley*, 5 Met. 400. In this case the limitation took effect in the middle of April; the act relied on was passed in May after, and therefore the plaintiff's right of action was barred.

By the operation of the *St.* of 1852, fixing the two years' limitation, the right of action in the present case, upon the construction in *King* v. *Tirrell*, did not apply to a case where the administration was taken and bond given after 1852, which was the present case, and the action was barred on the 12th of April 1855, before the *St.* of 1855. But the attempt to avoid this result on the part of the plaintiff was that it is within the exception in the statute which provides that the former act shall not apply to a case where the cause of action against the estate of the deceased, his executor or administrator, accrued prior to the passage of the act of 1852, and that this was so, because the cause of action against the deceased during his lifetime accrued before 1852, and therefore it should not apply to this case, in which the cause of action did so accrue. But a majority of the court are of opinion that this is not the true construction, but that the statute means the cause of action accruing against the estate, that is, the executor or administrator, and meant therefore to provide by law what in effect the court had decided, that it should apply to shorten the time of limitation where the executor or administrator had given bond before the passage of the act of 1852. The whole object of both statutes was to fix the time of limitation against an executor or administrator, with no reference whatever to the general statute of limitations, or to the rule of law fixing the time when an action accrues against a living person.

In construing the statute, we consider that this case is not within the act of 1855, because the cause of action against the executor did not accrue before May 1852. Then the action being already barred by the *St.* of 1852, the *St.* of 1855 did not open it, by the description of actions to which it was declared it should not apply; the *St.* of 1852 did apply and did bar the action, and this was not opposed by the statute of 1855.

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It is said that on this construction the St. of 1855 had nothing to which it could apply; but this seems not to be so. It was passed in May 1855, and related to May 1852. Administrations may have been taken between June 1851 and May 1855, under which causes of action had accrued against an administrator before May 1852, and thus could come under the operation of the statute.

Though coming to the same conclusion for different reasons, the court are all of opinion that the bar relied on by the defendant was not removed by the St. of 1855, and that judgment is to be rendered for the defendant.

Judgment for the defendant.

C. T. Russell, for the plaintiff.

W. Brigham, for the defendant.

EASTERN RAILROAD COMPANY *vs.* LEVI BENEDICT & another.

In an action upon an order to deliver stock, if the declaration alleges a demand according to the tenor of the order, the want of any demand cannot be taken advantage of under an answer which only denies the existence and acceptance of the order.

A promise to accept and pay an order for the delivery of stock in a corporation, which the drawee had agreed to pay for certain goods sold to him, is not within the statute of frauds, if those goods have been delivered to him; otherwise, if they have not.

In an action for not delivering stock according to an order which specifies no time of delivery, the measure of damages is the value of the stock when demanded.

ACTION OF CONTRACT to recover damages for the non-payment of the following order:

"September 24th 1850. Messrs. Benedict & Warren, Salem, Mass. Gentlemen: Please give Mr. D. A. Neale, President of the Eastern Railroad Company, stock in the Salem Gas Light Company at par to the amount of seven thousand dollars, and place the same to my account. Yours respectfully,

"Leonard Fuller."

The declaration alleged an acceptance and promise to pay

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the order, and a demand made according to its tenor. The answer put in issue the existence of such an order, and denied any acceptance thereof or promise to deliver stock under it. After the adjudication, reported in 5 Gray, 561, that these plaintiffs could bring the action, a trial was had before *Merrick*, J., who reported the following case for the decision of the full court:

"The plaintiffs offered no evidence tending to show a demand for the delivery of the stock mentioned in the order, before bringing the action. The defendants' counsel contended that proof of such demand was a necessary prerequisite to the maintenance of the action. Upon this point I ruled, that such a demand was alleged in the writ, and not denied in the answer, and that therefore it need not be proved by the plaintiffs.

"The plaintiffs offered evidence tending to prove that Fuller made with the defendants a written contract to furnish them with iron pipe for the Salem Gas Light Company, whose works they had agreed to construct, and to take his pay therefor in stock of that company at par; that the plaintiffs had contracted to sell and did sell to Fuller a quantity of iron for $7000, agreeing to take payment therefor in stock of said company at par; that while the negotiations between the plaintiffs and Fuller were going on, George Odiorne, (who acted as broker for the plaintiffs, but did not disclose his agency to the defendants,) went to one of the defendants, and obtained a parol promise by the defendants to accept an order to be drawn by Fuller on them — the person in whose favor the order was to be drawn, and the time when the stock was to be delivered, not being mentioned — for $7000, payable in the stock of the Salem Gas Light Company at par; that afterwards the bargain between the plaintiffs and Fuller was completed, the iron sold, and a bill of sale thereof given, and said order on the defendants taken in payment therefor.

"The defendants' counsel contended that such a promise as above mentioned, if proved, was insufficient to maintain the action, because the promise was not in writing, and was without consideration, and because neither the payee of the order, nor the time when the order was to be payable, was mentioned

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or included in the promise; and that this evidence should not be received.

"The plaintiffs also offered evidence tending to prove a parol promise by the defendants to the plaintiffs to accept the order now in suit after the same was drawn. The defendants' counsel objected to this evidence, because the promise was not in writing, and was without consideration.

"Thereupon I submitted to the jury the following questions, and ruled, for the purposes of the trial, that if the jury found in the affirmative upon either of them, it would be sufficient to enable the plaintiff to maintain the action:

"1st. Did the defendants, before the order of Fuller now in suit was drawn, verbally agree to accept an order to be drawn by him — the person in whose favor it was to be drawn not being mentioned, nor the time when the stock was to be delivered — for seven thousand dollars, payable in the Salem Gas Light Company's stock at par?

"2d. Did the defendants, after the order now in suit was drawn, verbally promise and agree with the plaintiffs to accept it?

"The jury found in the affirmative upon both questions; whereupon I directed a general verdict to be taken for the plaintiffs.

"Upon the subject of damages, the defendants' counsel contended that the measure of damages should be the value of the stock at the time when the breach of the defendants' promise was made, or at the date of the writ. I ruled that the measure of damages should be the value of the stock at the time of the trial, and the damages were assessed by the jury accordingly."

J. P. Healy, for the defendants, upon the measure of damages, cited *Quarles* v. *George*, 23 Pick. 400; *Shaw* v. *Nudd*, 8 Pick. 9; *Parks* v. *Boston*, 15 Pick. 206; *Stone* v. *Codman*, 15 Pick. 297; *Weld* v. *Oliver*, 21 Pick. 559.

G. M. Browne, for the plaintiffs, upon the same question, cited *Shepherd* v. *Johnson*, 2 East, 211; *M'Arthur* v. *Seaforth*, 2 Taunt. 257; *Harrison* v. *Harrison*, 1 Car. & P. 412; *Downes* v. *Back*, 1 Stark. R. 318; *Clark* v. *Pinney*, 7 Cow. 681.

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THOMAS, J. 1. The ruling of the presiding judge, as to the effect of the allegation of a demand in the declaration, not denied in the answer, was in strict conformity to the *St.* of 1852, *c.* 312, § 26. Alleged with substantial precision and certainty, and not denied in clear and precise terms, it must be deemed to be admitted.

2. If the iron had been delivered under the contract to the defendants by Fuller, such delivery of the iron would be payment for the stock. If so, the agreement to accept the order to transfer to the plaintiffs would not be within the statute of frauds. It would not be an agreement to sell and transfer stock. The stock would have been already purchased and the consideration paid. It would be but an agreement to transfer the stock to which Fuller was entitled to the plaintiffs.

But if, on the other hand, the iron had not been delivered, it would be an agreement for the sale and delivery of so much stock, the evidence of which should, under the fourth section of the statute of frauds, have been in writing. Rev. Sts. *c.* 74, § 4.

3. The true measure of damages was the value of the stock at the time when, under the contract, it should have been delivered. No time being specified in the order for the delivery, the time when the demand was made must be the point at which the value is to be fixed. *New trial ordered.*

CHARLES A. WELCH, Administrator, *vs.* JOHN MCCLINTOCK.

By a charter party of a vessel for a voyage from New York to Charleston, and thence to Liverpool, the master and partowner agreed to victual and man the vessel and keep her in good condition, and the charterer agreed to furnish her with a full cargo of cotton at Charleston and to pay a certain freight on delivery of the cotton in Liverpool; the vessel was to be consigned to the charterer's friends in Charleston, and to their agents in Liverpool; and what money the master might require for the ship's disbursements in Charleston was to be advanced to him, and paid by his bill of exchange on the freight. The vessel was laden at Charleston, and the master drew a bill accordingly on the said agents at Liverpool, and by letter requested them to accept the same and to insure the amount on account of the owners of the vessel. The vessel on her arrival at Liver-

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pool was committed to said agents, and they paid the disbursements, delivered a portion of the cargo and collected part of the freight, and then became bankrupt. The master collected the rest of the freight himself, and paid the bill of exchange which he had drawn on them. *Held*, that drawing the bill on the consignees at Liverpool did not make them the master's agents to collect freight; that he had a lien on the freight for the charter money, and was entitled to retain from the amount collected by him the whole of the charter money, after deducting the ship's disbursements at Liverpool.

ACTION OF CONTRACT by the administrator of Claudius Dord against the master and partowner of the Ship Medallion, for money had and received to the plaintiff's use, under a charter party executed on the 26th of October 1852, whereby the defendant lets the Medallion to Dord for a voyage from New York to Charleston, S. C., and thence to Liverpool, and "doth engage that the vessel in and during the said voyage shall be kept tight, stanch, well fitted, tackled and provided with every requisite, and with men and provisions necessary for such a voyage;" and Dord "doth engage to provide and furnish the said vessel with a full cargo of lawful merchandise (or sufficient for ballast) during the voyage aforesaid, with a full and complete cargo of cotton;" and to pay to the defendant or his agent, "for the charter or freight of said vessel during the voyage aforesaid, three eighths of one penny sterling per pound for cotton bales, with five per cent. primage, payable on delivery of the cargo in Liverpool;" and it is agreed "that what money the master may require for ship's disbursements in Charleston will be advanced, taking his bill on the freight, subject to the usual charges on the same;" "that this charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to said Dord or his agent"; and "that the ship will go consigned to charterer's friends, Messrs. Stewart, Harper & Co. of Charleston, and to their agents at Liverpool, free of commissions and brokerage on freight at Charleston; also to be free of wharfage and dock dues." Trial before *Bigelow*, J., who made the following report thereof:

"It appeared that the defendant proceeded with the ship to Charleston, where Stewart, Harper & Co. caused her to be laden with a full cargo of cotton, for which the defendant signed bills of lading at four eighths of a penny per pound; that the plain-

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tiff's friends, Stewart, Harper & Co., at Charleston, agreeably to the charter party, designated Collman & Stolterfoht, of Liverpool, as the persons to whom the ship should be consigned; and wrote and forwarded to them a letter, (a copy of which is in the margin,*) and wrote another letter (also copied in the margin †) to Hopley & Co. of Charleston, (who were shippers of a large part of the cargo, and correspondents of Collman & Stolterfoht,) which was transmitted to Collman & Stolterfoht by Hopley & Co., with a request that they would conform to it and advise them of the settlement.

"The defendant introduced the deposition of Herman Stolterfoht, of the firm of Collman & Stolterfoht, who testified that the instructions which said firm received as to the disposition of the freight of the Medallion were contained in said letters, and

* Charleston, 1st December 1852.

Messrs. Collmann & Stolterfoht, Liverpool.

Gentlemen, We chartered the Ship Medallion to sail from this port to Liverpool with a cargo of cotton, at three eighths of one penny per lb., and five per cent. primage on said rate, payable on delivery of said cargo in good order at the port of Liverpool.

The ship is not to be bound for more, for collecting said freight, according to our understanding, than if the captain had signed bills lading for only the rate mentioned in the charter party. Yours truly,

Stewart, Harper & Co.

P. S. There are thirty one bales in the cabin and sails-room, on which the captain is to receive full freights, say one half penny per lb.

† Charleston, 3d December 1852.

Messrs. G. A. Hopley & Co., Charleston.

Gentlemen, We herewith enclose charter party of the Ship Medallion, which please forward to the consignees in Liverpool, Messrs. Collmann & Stolterfoht, with instructions to pay the amount of freight, as per charter party, to whoever may be legally authorized to receive the same on the part of the owners of said ship, and to reserve whatever amount over and above this sum, which is due by bills lading of her present cargo, and subject to your orders.

Capt. McClintock has this day valued on Messrs. Collmann & Stolterfoht in our favor, for £364 8s. 1d. against freight earned by the ship under the charter party; which please advise them to honor. Yours truly,

Stewart, Harper & Co.

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that they had no other instructions whatever; and the defendant drew a bill on them for £364 8*s.* 1*d.*, directed to be charged 'to account of freight of ship Medallion,' which he requested them by letter to honor and to insure the amount for account of the owners, and which was accepted by them, but never paid, and was afterwards taken up by the defendant.

"The defendant introduced evidence tending to prove that by the custom of Liverpool the consignees of a ship are to collect the freight. The witness who so testified, in answer to a question by the plaintiff, said he did not mean to say that there is a custom to prevent a master from collecting his freight from the consignee of the cargo before he delivers his cargo, or as it passes over his vessel's side, even if he is consigned to a mercantile house there, if bills of lading have been signed as referred to.

"On the ship's arriving at Liverpool, she was placed in the hands of Collman & Stolterfoht, who paid the disbursements of the ship, and delivered her cargo, except nine hundred and ninety four bales, which were not claimed by the consignees thereof; and received a portion of the freight therefor, at the rate mentioned in the bill of lading, and then became bankrupt. The defendant thereupon interfered to prevent the uncollected portion of the freight from going into their hands, and collected it himself, including the freight on the nine hundred and ninety four bales; and this action was brought to recover from him one quarter of what he so received, as belonging to the plaintiff.

"The defendant drew up an account, wherein he charged the plaintiff with full freight as per charter party, three eighths of a penny per pound on the whole cargo, viz: that delivered by Collman & Stolterfoht and by himself, deducting the disbursements paid by Collman & Stolterfoht; and claimed to retain out of the money received by him as aforesaid enough to make up his entire freight by charter party.

"It was in contest between the parties whether Collman & Stolterfoht had been constituted agents both of the owners and of the charterers to receive the whole freight of the cargo, as per bills of lading, and to hold three quarters thereof to the credit

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of the said owners, and one quarter thereof to the credit of the charterers; the plaintiff contending that they were agents of both; and the defendant contending that they were not his agents to collect his freight as per charter party. The case was submitted to a jury on this question, who found for the defendant.

"The plaintiff further contended that, at all events, the defendant, by drawing the said bill of exchange on Coleman & Stolterfoht, which they accepted, and sending the letter annexed, had given to them the right to collect freight as his agents to that amount, and therefore that he was entitled to recover of the defendant a larger amount than the sum for which the defendant offered to be defaulted. But the judge reserved this question for the consideration of the whole court. If the whole court should be of opinion that the ground contended for by the plaintiff should be sustained, then judgment would be rendered for such sum in addition to the verdict as the court should direct, with costs for the plaintiff; and otherwise, judgment on the verdict for the amount only for which the defendant had offered to be defaulted, without costs, and costs for the defendant after the offer to be defaulted."

C. A. Welch, pro se.

J. C. Dodge, for the defendant.

Shaw, C. J. The defendant, as master, had the right by the general maritime law to receive the whole of the freight at Liverpool, as by the bills of lading which he had signed. But for the money which he would thus have received he would be accountable to the charterers; he was their agent to sign bills of lading and receive freight on delivery. Collman & Stolterfoht were the agents of the charterers at Liverpool, to receive all moneys collected for them by the master. Had he collected the whole of the money, he would have been accountable to those agents for the charter money, that is to say, by himself holding for the owners of the ship three fourths of the amounts received under the bills of lading, and paying over the balance to the said agents of the charterers. The master would, in his capacity of partowner and agent of the other owners, have had

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a lien on this freight money for his charter money. Thus the whole account would have been settled.

But the master would have had a lien only, which he would not be bound as agent of the charterers to enforce, for in effect it would have been enforcing it against themselves. If they had chosen to permit their agents Collman & Stolterfoht at Liverpool to collect the whole freight of the shippers, and the master had consented to it, the charterers would still have been liable on their express contract for the charter money, whether Collman & Stolterfoht paid it over to their principals, the charterers, or not. Had there been no bankruptcy till the freight was all collected, this might have been the result.

The money due from the shippers, being the money of the charterers and being collected by their agents, whether those agents paid it to them or not, the charterers are liable to the shipowners for the charter money. If the agents failed with the charterers' money in hand, it must be the loss of their principal. All which did receive, they received in that capacity. But they could only receive by permission of Captain McClintock; and when they became bankrupt, it was for the benefit of all concerned that they should receive no more; and therefore Captain McClintock rightfully interfered, according to his right and power as master, for the benefit of all concerned.

Had he received the whole of the freight due from the shippers, he would have had a lien on the whole for the charter money due the owners. The whole being subject to such lien, every part was so. If, after he withdrew the authority, he received freight of shippers, his lien for the whole of the charter money attached to the portion of the freight received; and if it was sufficient to pay the charter money, he had a right so to appropriate it.

Does the drawing of the bill in Charleston make any difference? By the charter party, the owners were to victual, man and navigate the ship at their own expense. They must therefore pay all disbursements at Charleston. But there was a stipulation in the charter party, that the charterers or their agents should advance all the necessary disbursements at Charleston,

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taking a bill payable from the freight (charter money) at Liverpool. But the charter money would be paid on account of the ship; and if the ship should not arrive at all, then it would not be due at all, and then the advance must be repaid.

The disbursements were made by Stewart, Harper & Co., the charterers' agents at Charleston, and according to agreement they took Captain McClintock's bill on their own agents for their reimbursement, payable in Liverpool out of the charter money, which would be due him on arrival of the vessel and delivery of the goods. Had the vessel never arrived, Captain McClintock would have been obliged to pay the bill, being the amount of the disbursements, and therefore that amount was at the risk of the owners, was insured for their benefit, and they paid the premium. But if the ship should arrive and deliver the cargo, the charter money would be due to the charterers; and whether the freight due from shippers was received by the agents or by the master, this would be a fund out of which the bill would be paid. If the master received it, he must pay the bill, and it is said that he did.

Stewart, Harper & Co. had their remedy as holders of the bill accepted, either by proving it against Collman & Stolterfoht or, as they did, claiming it of the drawer; and then their remedy for their part of the freight received by Collman & Stolterfoht would be by charging it as money had and received in account, and proving it against their estate if the balance was in favor of Stewart, Harper & Co.

This result is not varied in our opinion by the stipulation in the charter party, that the vessel is to go consigned to the charterers' friends Stewart Harper & Co. in Charleston and to their agents in Liverpool. This does not in any manner make Collman & Stolterfoht agents of the owners, for all purposes or for the purpose of collecting shippers' freight. The effect would be that, as such consignees, whatever sums they disbursed for the owners, the owners would be liable to them for. But it did not alter the relation of the master to the charterers, by which he was authorized to collect all the freight of the shippers, being accountable to the charterers' agents for it, first deducting his charter.

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As to the custom in Liverpool, we do not understand that it goes further than this: that when the consignees of the vessel are persons in good credit, the freight bills are placed in their hands for collection by the master; but we do not understand that any custom prevails there contrary to the common rule of maritime law, that when the money is due on bills of lading, whoever is owner, either absolutely or for the particular voyage, it is the right of the master in the first instance to collect them, and optional with him whether or not to authorize the person to whom the vessel is consigned to collect them.

The court are therefore of opinion that the plaintiff has no right to recover, beyond the amount for which the defendants offered to be defaulted, and that judgment be entered on the verdict, with costs for the plaintiff to the time of such offer, and for the defendant since.

HENRY N. ALBEE *vs.* JAMES WYMAN.

Whether articles of separation, between husband and wife actually living apart, in which the husband covenants with a trustee to provide for the future separate maintenance of the wife, are valid in this commonwealth, *quære*.

Whether a covenant, in articles of separation, that the husband will pay an annuity to the wife during her life, is discharged by her obtaining a divorce and marrying another man, *quære*.

By articles of separation a husband covenanted, in consideration of his wife's withdrawing a libel for divorce, to pay her a sum yearly during her life. The wife afterwards, by another similar libel, obtained a decree for divorce from the bond of matrimony, and for alimony, which by agreement was fixed at the sum payable under the articles; and the wife, after receiving two instalments of such alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum. *Held*, that the covenant, if ever valid, was discharged.

ACTION OF CONTRACT on an indenture, dated November 1st 1843, between the defendant, his wife Margaret Wyman, and the plaintiff, which recited that the defendant and his wife had for some time lived apart, and had mutually agreed to do so for the rest of their lives, and that the wife had agreed to with

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draw a libel for divorce pending in this court, and in consideration thereof the defendant had agreed to allow her $300 annually during her life for her maintenance and support; contained covenants by the defendant to suffer his wife to live apart and without molestation during their joint lives, and to pay to her, or to the plaintiff for her use, $300 annually, in at least semiannual payments, during her natural life; set forth certain conveyances from the defendant to the plaintiff for securing that annuity; and by which the plaintiff covenanted to appropriate the proceeds of such securities to the payment of the annuity, and after the death of the wife to reconvey the same to the defendant, and also agreed in behalf of the wife that she accepted this provision made for her support, and that the defendant might in like manner live apart from her.

At the trial in this court it appeared that in 1851 the defendant's wife filed a libel for divorce on the ground of adultery, in the same words as the libel mentioned in the indenture, but covering the subsequent time, and in January 1852 obtained thereon a decree for divorce and alimony, and within a month afterwards married another man; that the securities mentioned in the indenture had been reconveyed by the plaintiff to the defendant; and that since the wife's second marriage, her alimony under the decree of divorce had been reduced by the court, on petition of the defendant, to a nominal sum.

The counsel for the wife in both libels, and who was admitted to have been authorized to act for her in the matter, testified that while the second libel was pending he had negotiations with the defendant's counsel as to the amount of alimony, which was finally arranged at $300 annually, payable in quarterly instalments, and secured to his satisfaction; that notes for the first two instalments were given and afterwards paid by the defendant; that no steps were taken to recover the sum stipulated in the indenture until after the reduction of the alimony as aforesaid; and that he understood that after the decree for alimony she was to have $300, not $600, and that he was to give up the indenture when security was given for the alimony.

Upon this evidence, *Metcalf*, J. was of opinion that the action

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could not be maintained, but reported the case for the decision of the full court.

G. F. Homer, for the plaintiff. 1. It is the settled law of England, that courts of law and equity will sustain the covenants of a husband with a trustee for his wife's support, in articles of separation, where the separation exists already or is to be immediate. *Rodney* v. *Chambers*, 2 East, 283. *Bateman* v. *Ross*, 1 Dow, 235. *Westmeath* v. *Westmeath*, Jac. 136. *Clough* v. *Lambert*, 10 Sim. 174. *Worrall* v. *Jacob*, 3 Meriv. 268. *Scholey* v. *Goodman*, 1 Bing. 349. *Wilson* v. *Mushett*, 3 B. & Ad. 743. *Jee* v. *Thurlow*, 2 B. & C. 547. *Wilson* v. *Wilson*, 14 Sim. 416. *Ker* v. *Ruxton*, 11 Eng. Law & Eq. 220. *Sanders* v. *Rodway*, 16 Beav. 207. *Webster* v. *Webster*, 1 Sm. & Gif. 489. Clancy on Husb. & Wife, (1st Amer. ed.) 397, 399. 2 Bright on Husb. & Wife, 305.

The English doctrine has been affirmed in the following American cases: *Page* v. *Trufant*, 2 Mass. 159. *Hollenbeck* v. *Pixley*, 3 Gray, 521. *Baker* v. *Barney*, 8 Johns. 72. *Anderson* v. *Anderson*, 1 Edw. Ch. 380. *Champlin* v. *Champlin*, Hoffm. Ch. 55. *Beach* v. *Beach*, 2 Hill (N. Y.) 260. *Carson* v. *Murray*, 3 Paige, 483. *Rogers* v. *Rogers*, 4 Paige, 516. *Shelthar* v. *Gregory*, 2 Wend. 422. *Calkins* v. *Long*, 22 Barb. 97. *Nichols* v. *Palmer*, 5 Day, 47. *Hutton* v. *Hutton*, 3 Barr, 100. *Blaker* v. *Cooper*, 7 S. & R. 500. *Reed* v. *Beazley*, 1 Blackf. 97. *Carter* v. *Carter*, 14 Sm. & Marsh, 59. *Brown* v. *Brown*, 2 Maryland Ch. 316. *Chapman* v. *Gray*, 8 Georgia, 341. *Bettle* v. *Wilson*, 14 Ohio, 257.

The compromise of a suit by the wife has been held a good consideration for such covenants, even against creditors. *Wilson* v. *Wilson*, 14 Sim. 405. *Jodrell* v. *Jodrell*, 9 Beav. 45. *Page* v. *Trufant*, 2 Mass. 159. See also 2 Bright on Husb. & Wife, 333–335; Bell on Husb. & Wife, 531–535; *Frampton* v. *Frampton*, 4 Beav. 287.

The objections against the policy of articles of separation have been fortified, if not caused, by difficulties arising from the province of the ecclesiastical courts; by special provisions as to future separation; and by the doctrine that after the execution

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of a deed of separation the wife was to all intents a *feme sole*. And such objections are uniformly accompanied by a declaration that the validity of proper articles of separation is too clearly established to be questioned. *St. John* v. *St. John*, 11 Ves. 526. 2 Bright on Husband & Wife, 523.

2. The wife's divorce and second marriage are no bar to that action on the unqualified covenant of the husband to pay her an annuity during her life. *Jee* v. *Thurlow*, 2 B. & C. 547. *Wilson* v. *Mushett*, 3 B. & Ad. 743. *Blaker* v. *Cooper*, 7 S. & R. 500. *Babcock* v. *Smith*, 22 Pick. 61. Bishop on Mar. & Div. § 670.

3. No agreement to substitute the decree of alimony for the covenant in the articles is shown; and if it was, it would be ineffectual without the wife's consent. *Seagrave* v. *Seagrave*, 13 Ves. 439. *Calkins* v. *Long*, 22 Barb. 109. *Eastman* v. *Wright*, 6 Pick. 322. *Grover* v. *Grover*, 24 Pick. 266.

H. C. Hutchins, for the defendant. 1. Articles of separation have never been recognized in this commonwealth, and the court will not adopt a policy which has always been regretted even where it has been most fully established. *Evans* v. *Evans*, 1 Hagg. Consist. 35. *Jee* v. *Thurlow*, 2 B. & C. 547. *Durant* v. *Titley*, 7 Price, 577. *St. John* v. *St. John*, 11 Ves. 526. *Westmeath* v. *Westmeath*, 1 Dow & Clark, 519. *Rodney* v. *Chambers*, 2 East, 283. *Worrall* v. *Jacob*, 3 Meriv. 268. *Jones* v. *Wait*, 7 Scott, 317. *Rogers* v. *Rogers*, 4 Paige, 516. *Champlin* v. *Champlin*, Hoffm. Ch. 55. *Heyer* v. *Burger*, Hoffm. Ch. 1. *Miller* v. *Miller*, Saxton, 386. *Hope* v. *Hope*, 22 Beav. 351. 2 Story on Eq. §§ 1427, 1428. Articles of separation have been upheld in England on account of the difficulty and expense of procuring divorces, reasons which do not exist here. *Ames* v. *Chew*, 5 Met. 320. To uphold them would allow man and wife to separate for any cause, and encourage and confirm the separation by a fund set apart for the purpose.

Articles in contemplation of future separation have always been held void. *Florentine* v. *Wilson*, Hill & Denio, 303. *Westmeath* v. *Salisbury*, 5 Bligh N. R. 339. And what is the difference in policy between a past and a future separation? *Jones* v. *Wait*, 7 Scott, 317.

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These articles are void because they do not show a sufficient cause for the separation. *Jones* v. *Wait*, 7 Scott, 817.

2. The agreement of the defendant to pay the annuity is based on the relation of husband and wife in a state of separation, and his duty to support her. But that *status* has been entirely changed by the divorce and second marriage, which have annulled the articles and discharged the defendant from his liability. *Charruaud* v. *Charruaud*, 1 N. Y. Leg. Obs. 134. *Hastings* v. *Orde*, 11 Sim. 205.

Reconciliation, without any act of cancellation, annuls articles of separation and rights growing out of them, even though the articles be so expressed as to provide for the wife during her life; because such articles are based on separation, and by reconciliation new obligations arise, inconsistent with separation; *a fortiori* new obligations by divorce and second marriage. *St. John* v. *St. John*, 11 Ves. 521. *Westmeath* v. *Salisbury*, 5 Bligh N. R. 339. Shelford on Mar. & Div. 629. Clancy on Husb. & Wife, 414. *Fletcher* v. *Fletcher*, 2 Cox Ch. 99. *Bateman* v. *Ross*, 1 Dow, 235.

3. It appears from the testimony of the plaintiff's counsel that the indenture was retained only as security for the payment of the alimony; and that being diminished to a nominal sum, no action can be maintained on the indenture to recover the annuity.

Dewey, J. The contract sought to be enforced is one for the separate maintenance of the wife, made between husband and wife through the intervention of a trustee, in whose name this action is brought. It was an agreement for their living apart during their joint lives, and contained a covenant on the part of the husband that he would suffer this without any molestation of the wife on his part, and would pay to the plaintiff for her use $300 per annum during her life, for her maintenance and support; the wife also on her part covenanting, through the plaintiff, that she would allow the husband to live separate without molestation from her, and accepting the provision thus made for her support. It further appeared that the parties had, for some time previous to the execution of this agreement, actually lived separate and apart.

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It must be assumed that such a contract would, by the well settled law of England, be held valid, although obnoxious certainly to very grave objections, arising from the relations of the respective parties and the impolicy of furnishing facilities for a continued separation of those whose solemn obligations and duties have united them as members of one family. Numerous decisions are found in different states of the Union in accordance with the English doctrine. But in the view we have taken of the merits of the case upon other points, it has become unnecessary to consider at large the question of the validity of such contracts in Massachusetts.

Assuming this contract to have been valid in its inception, the question arises whether the subsequent acts of the parties thereto have not discharged the defendant from any further liability upon this contract to make the annual payment therein stipulated.

The principal grounds of defence relied upon by the defendant are: 1st. The renewal on the part of Mrs. Wyman of her application for a divorce from the bonds of matrimony upon the alleged ground of adultery on his part, and her obtaining such decree of divorce; 2d. The subsequent marriage of Mrs. Wyman to another person, with whom she now cohabits, and who is bound to support her; 3d. The agreement and understanding of both parties that upon the obtaining of such divorce, and a decree for alimony to be paid her, such decree for alimony was in lieu of the provision for her maintenance that was contained in the articles of separation.

As to the first and second of these grounds, no controversy exists on the facts; but the question is of the legal operation of those facts. The plaintiff insists that, as matter of law, these facts do not affect the liability of the defendant to pay to his late wife the annual sum stipulated to be paid to her for her support and maintenance.

We are referred to the case of *Jee* v. *Thurlow*, 2 B. & C. 547, as sustaining the view that such subsequent divorce and marriage afterwards by the wife to another person do not discharge the former husband from a continued liability on

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promise like the present. That case differs from the present in that the subsequent divorce was obtained by the husband on his application. It might properly be held that the husband could not thus defeat his own covenant to pay his wife an annual sum during her life. Again, it is to be remarked that the divorce there obtained was only a divorce *a mensa et thoro*. The relation of husband and wife still existed, though in a modified form, and the effect of the divorce was not such as to authorize the wife to marry again, and it left her equally dependent upon her husband for support as before.

The case of *Blaker* v. *Cooper*, 7 S. & R. 500, is more relied upon, and is more in point. In that case an action was sustained upon such a bond and articles of separation, in which the husband covenanted to pay a certain sum annually for the use of the wife, "during the term of her natural life," notwithstanding a subsequent divorce between the parties and her subsequent marriage to another person, the court holding that those facts did not discharge the liability of her first husband upon his bond. It does not appear from the case as reported which party applied for and obtained the divorce. Another fact however does appear, which may be thought of some importance, that, as a consideration for the agreement on the part of the husband to pay her a certain annual sum during her life, she released her right of dower in his real estate.

On the other side, the argument is pressed upon us that this agreement on the part of the husband was based upon the existing relations between the parties as husband and wife, and his duty, as long as that relation existed, to support the wife; that the divorce of the parties from the bond of matrimony changed that relation; and that upon such decree of divorce she would be entitled to her support and maintenance in another form, by an allowance of alimony, an allowance which might exceed in amount the sum agreed to be paid under the articles of separation, and be paid at more frequent intervals. These facts, in connection with the further fact that immediately after obtaining such divorce she had married another person, it is contended should *per se* discharge the further liability of her first husband

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to pay her the annual allowance originally stipulated to be paid.

Whether these facts standing alone — that is, a mere divorce and subsequent marriage — would be held to discharge the defendant from liability in the present action, is certainly questionable. Although there are many reasons that might be urged to support that position, yet it may be that the bond is too absolute in its terms to be thus limited to the period of the continuance between the parties of the relation of husband and wife. The weight of authority, so far as presented in the argument of the case, would seem to that effect.

This has led us to consider the other portions of the defence, and those which are peculiar to the present case. The facts already alluded to are to be taken in connection with those which we are about to state. The fact, recited in this indenture as the consideration of the agreement to pay Mrs. Wyman $300 annually during her life, that the wife had agreed to withdraw a libel for divorce then pending in this court, is to be considered in deciding the question of the defendant's liability. The libel was for the time withdrawn, but the same libel, that is, a libel *in totidem verbis*, was subsequently filed anew, embracing all the allegations in the former libel, and only varied in its effect by the date, which could extend the charges to a later period of time, but included all that were set forth in the first libel. Upon obtaining a decree for divorce upon this second application, she claimed an allowance for alimony. Such alimony was allowed, and ordered to be paid her quarteryearly by the defendant. It is shown that the sum fixed to be the amount of the alimony was finally a matter of arrangement between the parties; that it was to be the same sum as was to be paid under the articles of separation, the sum of $300 annually. It is admitted that it was not an additional allowance of $300, and that it was not the expectation or understanding of the parties that Mrs. Wyman should have $300 as alimony, payable quarteryearly under this decree, and also the further sum of $300 annually under the stipulations of the articles of separation. It is conceded that only one sum of

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$300 is properly demandable of the defendant; but it is said that the defendant failed to give security for the future payment of the alimony, although he did so as to the first two payments, which were actually received by Mrs. Wyman, and embraced more than the period before her second marriage.

As it seems to us, the wife did accept this decree for alimony in lieu of the provision for her support and maintenance in the articles of separation. She acted upon the understanding that such was to be the effect of the divorce and decree for alimony. She received the first two quarters' allowance under that decree. As it is conceded they were not both to exist as liabilities of the husband; by accepting the latter and enjoying its benefits, she discharged the former. Subsequently to the marriage of Mrs. Wyman to another husband, this court has thought proper to reduce the amount of alimony to a nominal sum, and for the reason that it was not necessary or proper to charge her former husband for her future support.

Under these circumstances, Mrs. Wyman seeks again to revive the old obligation for her maintenance, found in the articles of separation. This, we think, she cannot do. The application for a divorce and alimony was her own affair, a voluntary act of hers, instituted for her benefit. So long as she remained unmarried, no ground existed for lessening the amount of such alimony, while, of course, it was open to her application for increase for good cause. By her act of subsequent marriage, she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of the alimony.

Upon the whole case, as disclosed by the evidence and the conceded facts, the court are of opinion that the plaintiff is not entitled to recover in this action.

Judgment for the defendant.

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JAMES O'CONNOR *vs.* CALVIN VARNEY.

A judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such nonperformance.

ACTION OF CONTRACT to recover damages for Varney's failure to build certain additions to a house according to the terms of a written contract between the parties. Answer, a judgment recovered by O'Connor in an action brought by Varney against him on that contract to recover the price therein agreed to be paid for the work, in defence of which O'Connor relied on the same nonperformance by Varney, and in which an auditor to whom the case was referred, and upon whose report that judgment was rendered, found that Varney was not entitled to recover under the agreement, by reason of the work having been so imperfectly done that it would require a greater sum than the amount sued for to make it correspond with the contract.

At the trial of this action *Bigelow*, J., upon the inspection of the auditor's report and the record in the former action, ruled that that judgment was a bar, and ordered a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

C. G. Thomas, for the plaintiff.

J. W. Hubbard, for the defendant.

SHAW, C. J. The presiding judge rightly ruled that the former judgment was a bar to this action. A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defence. But if he intends to claim, by way of damages for nonperformance of the contract, more than the amount for which he is sued, he must not rely on the contract in defence, but must bring a cross action, and apply to the court to have the cases continued so that the executions may be set off. He cannot use the same defence, first as a shield, and then as a sword. *Bennett* v. *Smith*, 4 Gray, 50. *Sargent* v. *Fitzpatrick*, 4 Gray, 511. *Sawyer* v. *Woodbury* 7 Gray, 499.

Exceptions overruled.

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President, Directors and Company of the Merchants' Bank of Newburyport *vs.* Joshua T. Stevenson & others.

It seems, that the payment of dividends and preferred debts in insolvency out of the estate of a manufacturing corporation does not diminish the liability of its directors under the Rev. Sts. *c.* 38, § 25, for the excess of its debts over its capital stock.

The liability of directors of a manufacturing corporation under the Rev. Sts. *c.* 38, §§ 25, 29, 31, for the excess of its debts over its capital stock, must be enforced by bill in equity, and not by action at law, if the debts for which the directors are so liable amount to more than such excess.

Action of tort upon the Rev. Sts. *c.* 38, § 29, against the directors of a manufacturing corporation. Writ dated January 15th 1856.

The declaration set forth the making by the Glendon Rolling Mill, on different days between September 15th and November 15th 1852, of four promissory notes to the plaintiffs, and the liability of that corporation to them at the time of the making of each note; the amounts of the capital stock actually paid in, and of the debts of the corporation; that such debts exceeded the amount of such capital stock; and "that the defendants, at the time said note was made, were officers of said corporation, to wit, the directors thereof, whereby and by force of the statute in such case made and provided the defendants became liable to pay to the plaintiffs the amount of said note and interest thereon, and an action has accrued to the plaintiffs to have and demand the same of the defendants."

The defendants severally demurred to the declaration, and assigned the following causes of demurrer:

1st. That it did not appear that at the time when this action was brought the debts owed by the corporation did exceed the amount of its capital stock actually paid in, or, if such excess had at any previous time existed, that the whole debt of the corporation had not then been reduced to the amount of its said capital stock.

2d. That it appeared that at the times of contracting the several debts of the corporation, mentioned in the declaration,

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there were other creditors of the corporation, having claims similar to the plaintiffs, who were not made parties to this suit.

3d. That such creditors were entitled to claim of the defendant and the other directors of the corporation, a proportional payment of their respective demands, on account of the said alleged excess; and that their rights and the plaintiffs', and the liabilities, if any, of the defendant and the other directors of the corporation to them, could not be determined at law, but only by bill in equity.

The case was submitted to the decision of the court upon the declaration and the demurrers, and the following facts, which it was agreed, for the purposes of this hearing, should be considered as if alleged in the declaration and admitted by the demurrers:

Said manufacturing corporation was chartered in March 1847 with a capital of $500,000, all but $200 of which was actually paid in; went into operation and continued in business until the 16th of December 1854, when it stopped payment; and two days afterwards went into insolvency, and had assignees duly appointed under St. 1851, c. 327. At the times of the making of the four notes declared on, and of the commencement of the proceedings in insolvency, the debts of the corporation exceeded, in different amounts, such capital stock. Before this action was commenced, the whole amount of the debts of the corporation had been reduced by the payment of preferred debts and of dividends to less than the amount of such capital stock.

B. R. Curtis & F. C. Loring, for the defendants.

C. B. Goodrich, for the plaintiffs. 1. Whenever an excess of indebtment beyond the capital stock of a manufacturing corporation shall exist, "the directors, under whose administration it shall happen, shall be jointly and severally liable to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted, so long as they shall respectively continue in office, and until the debt shall be reduced to the said amount of the capital stock." Rev. Sts. c. 38, § 25. St. 1829, c. 53, § 8. *Milldam Foundry* v. *Hovey*, 21 Pick. 454

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The liability of the directors from an excess of indebtment attaches at the time when the debt is contracted, and not at the commencement of an action for its recovery. The plaintiffs aver the existence of an excess of indebtment at the time their debt was contracted; a subsequent reduction does not discharge the liability, but only protects the officers from debts subsequently incurred within that limit. Rev. Sts. *c.* 38, §§ 16, 19, 20, 22. The reduction must be by the act, and out of the private funds, of the directors; not by payments made by an assignee in insolvency of the corporation. *Stedman* v. *Eveleth*, 6 Met. 120. *Curtis* v. *Harlow*, 12 Met. 5.

2. Any creditor, whose debt has been contracted while the excess of indebtment continued, may have an action at law against the directors under whose administration the excess was created. The words of the statute upon this point are explicit. "When any of the officers of any manufacturing corporation shall be liable, by the provisions of this chapter, to pay the debts of such company, or any part thereof, any person to whom they are so liable may have an action on the case against any one or more of the said officers;" Rev. Sts. *c.* 38, § 29; or "may, instead of the proceedings mentioned in" §§ 29 & 30, "have his remedy against the said officers or stockholders by a bill in equity." § 31. The same election of remedies was given by St. 1829, *c.* 53, § 11.

The cases of *Harris* v. *First Parish in Dorchester*, 23 Pick. 112, and *Crease* v. *Babcock*, 10 Met. 531, arose under the Rev. Sts. *c.* 36, §§ 30, 31, which merely declared a liability, without specifying the remedy. This is more like a claim against the directors of a bank under *c.* 36, § 11, which expressly authorizes a creditor to pursue his remedy by action, or by bill in equity, at his election.

It does not appear that any other creditors who may have claims against the defendants will ever assert their rights. If they should, the defendants, whenever they shall have paid to the extent of their liability, may plead such payment in answer, and in discharge of any additional liability. Even if equity might have been resorted to, yet the plaintiffs have a right,

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under the statute, to proceed at law, until restrained by other creditors asking the assistance of the court, or by the defendants bringing their suit against all the creditors in like condition with the plaintiffs, with an offer to pay if liable; in either of which events the plaintiffs would be entitled, by reason of their diligence in asserting their legal rights, to priority of payment, or, at least, to their costs.

Shaw, C. J. The reduction of the debts within the capital stock by dividends and payments by the assignees was not such a reduction, within the meaning of the statute, as to exempt the defendants from liability.

But we are of opinion that an action at law, under the circumstances of this case, will not lie. The statute says that "any person to whom they are so liable may have an action on the case against any one or more of the said officers." Rev. Sts. c. 38, § 29. But taking this section in connection with § 31 of the same chapter, authorizing a bill in equity instead of such action at law; and with c. 81, § 8, giving this court jurisdiction in equity in all "cases in which there are more than two persons having distinct rights or interests, which cannot be justly and definitely decided and adjusted in one action at the common law;" we are of opinion that the plaintiffs' remedy is in equity.

Here all the directors are liable. It is like *Crease* v. *Babcock*, 10 Met. 533, except that in that case the defendants, stockholders, were liable in various amounts; whereas here the directors are liable for the whole amount for which any are liable. But the cases are alike in this, that there are various parties, having several and unequal claims against a common fund. That fund here consists, by statute, of the excess of the debt over the capital; and the claims of the creditors, by the case stated, greatly exceed that fund. *Harris* v. *First Parish in Dorchester*, 23 Pick. 112. *Atlas Bank* v. *Nahant Bank*, 23 Pick. 488. *Crease* v. *Babcock*, 10 Met. 531. *Thayer* v. *Union Tool Co.* 4 Gray, 75. *Demurrers sustained.**

* See *Merchants' Bank* v. *Stevenson*, 5 Allen, 325.

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Edward H. Jacot vs. Joseph G. Wyatt & another.

If notice of an intention to take the poor debtor's oath is served upon the creditor less than a mile from the place of examination, the time allowed him for travel, under *St.* 1845 *c.* 444, § 4, need only be a proportionate fraction of an hour.

A poor debtor who has, pursuant to *St.* 1855, *c.* 444, entered into a recognizance to deliver himself up within ninety days for examination, giving notice to his creditor and making no default, and to abide the final order of the magistrate, and who does attend before the magistrate, is not bound to surrender himself to the officer until the magistrate has certified a refusal to admit him to the poor debtors' oath.

Action of contract upon a recognizance, entered into on the 16th of February 1856 by Wyatt as principal and the other defendant as surety before a commissioner of insolvency; reciting the recovery of a judgment by Jacot against Wyatt in the superior court, and the issuing thereon of an execution, upon which Wyatt was arrested and brought before the commissioner; and conditioned that Wyatt should "within ninety days deliver himself up for examination, giving notice to his creditor," as provided by *St.* 1855, *c.* 444," "and making no default at any time fixed for his examination, and abide the final order of the magistrate thereon."

The case was submitted to the judgment of the court upon the recognizance, the statements in which were admitted to be true, and the following facts:

On the application of Wyatt, the commissioner issued a notice to the plaintiff of Wyatt's desire to take the poor debtors' oath at the commissioner's office at ten o'clock in the morning on the 14th of May; and this notice was served at fifty minutes past eight o'clock on the same morning upon the plaintiff's attorney at his office, which was less than one sixth of a mile from the office of the commissioner.

Wyatt appeared at the time and place appointed, and was examined under oath by the commissioner, but the plaintiff did not appear, either in person or by attorney, and the examination was adjourned by the commissioner to May 15th, thence to May

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16th, and again to May 23d, at all which times Wyatt duly appeared, but the plaintiff appeared at none of them, either in person or by attorney; and on the 23d of May the commissioner refused to administer the poor debtors' oath to Wyatt; but the execution on which Wyatt had been arrested having been returned to court, and there being no execution or precept upon which the commissioner could indorse any certificate of such refusal, the commissioner made no certificate or order in the case, and has made none since.

H. W. Paine & T. F. Nutter, for the plaintiff.

J. H. Bradley, for the defendants.

MERRICK, *J.* 1. The official notice, issued by the commissioner of insolvency to the plaintiff, that the defendant had been arrested on an execution in his favor, and desired to take the oath for the relief of poor debtors, was seasonably served upon his attorney. By the statute, the service must be made at least one hour before the time appointed for the examination of the debtor, with an additional allowance of time for travel at the rate of one day for every twenty-four miles to be travelled. St. 1855, *c.* 444, § 4. In both of these particulars the requirements of the law were complied with. The notice was served upon the plaintiff's attorney an hour and ten minutes before the time, and within one sixth of a mile of the place appointed for the debtor's examination. It is urged for the plaintiff that this was insufficient, because, upon a just interpretation of the provisions of the statute, he was entitled to one full hour for his travel; claiming that in the computation of the rate at which the allowance is to be made, the day is to be divided only into hours, and that fractions of hours are not to be taken into consideration. But there is no reason which calls for or can justify such a construction. The language of the statute is plain and unambiguous, and perfectly in accordance with the manifest intent of the legislature that relief should be promptly afforded to an imprisoned debtor. It does not contain a word which has a tendency to impose a limitation upon the division of a day into any known or appreciable sections of time, or to show that for this purpose hours are to be preferred to minutes.

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If it be suggested that, by resorting to the more minute division, the time allowed to the creditor may be, as it was in the present case, very brief, the decisive answer is, that was the very object and purpose for which the statute was enacted. Nothing is more apparent than that its chief end and design was to secure to the debtor, with the least practicable delay in the progress of the summary process which it provided, a discharge from his imprisonment. It may be well however to recollect, that, in conformity to the interpretation heretofore given to the provisions of a previous statute to which the present is in many respects similar, the plaintiff's attorney had in fact more than two hours' notice before the oath could have been lawfully administered to the debtor. He had the whole of the hour succeeding the one named in the notice, during which it was his right to appear and interpose objections to the allowance of the relief which was sought by the debtor. *Hobbs* v. *Fogg*, 6 Gray, 251.

2. But it is contended for the plaintiff that the recognizance entered into by Wyatt was forfeited because he did not deliver himself up for examination according to the condition upon which it was given. He appeared before the magistrate at the time and place fixed for that purpose; and also upon the several days to which the proceedings were adjourned, and was then always ready and prepared to yield obedience to whatever order should be made in the premises. But the plaintiff insists that this was insufficient; that the defendant, to avoid a breach of the condition of the recognizance, should have actually delivered himself up into the custody of the sheriff or his deputy.

We cannot think that a construction of the statute, which leads to this result, does justice to the language of its various provisions, or accords with its general scope and manifest purpose. As the first section declares that imprisonment for debt shall be forever abolished, so every provision which follows it shows an intention that, upon a compliance in the mean time with the requirements of law, no debtor shall be subjected to it, or detained in custody, until after a judicial determination that he is not entitled to the relief afforded by the statute. When

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a person is arrested, he shall, as soon as he has had reasonable opportunity to procure sureties, be carried before a competent magistrate. § 4. That is a duty peremptorily required of the officer who holds him in custody. Then the debtor at his own election may enter into recognizance with sufficient surety, in a sum double the amount of the execution, that he will either appear at a time then to be fixed for his examination, or that he will thereafterwards within ninety days deliver himself up for that purpose, and will give notice to the creditor as required by law, will make no default, and will abide the final order of the magistrate thereon. § 9. These provisions seem to be decisive of the question. As soon as the debtor has entered into the required recognizance, he is at once relieved from the control of the officer; and it is plain that the arrest is not to be renewed while the proceedings in relation to the examination are still pending, nor until it has been brought to a close and a final order therein has been made. In the mean time he is to be free from all restraint by virtue of the execution. He has only to make no default, and to abide the final order of the magistrate. If in pursuance of that order the oath provided for the relief of poor debtors is administered to him, he is never to return into custody; and it is only when it has been duly adjudged that he is not entitled to that relief, that the right of the creditor to insist upon his imprisonment under the execution, or of the officer to subject him to it, can revive. A different construction of the statute, and one which should lead to the conclusion that the debtor is to deliver himself up to the sheriff and become actually and in fact his prisoner at an earlier period in the proceedings, and even before his examination has been commenced, is directly opposed to its general design and the great object of securing the liberty of the debtor sought to be accomplished by it, and must be considered a mistaken and erroneous interpretation of its provisions.

There is another consideration leading to the same result, which it may be proper to mention, although it is not necessary to enlarge upon it. No duty is imposed upon the debtor, either to keep watch of the officer or of the disposition which he shall

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choose to make of the process committed to him for service. He cannot be expected therefore, when he is ready in compliance with the condition of his recognizance to deliver himself up for examination, to follow the officer in his round of duty; nor required, at all events, and upon peril of its forfeiture, to be successful in bringing himself into his presence. He is, on the other hand, bound to give due and legal notice to the creditor, his agent or attorney, who may, if he desires it, see that the officer is present when the final order is made. If he does not choose to attend or to place himself in a position where he can execute his precept, there can afterwards be no ground for asserting that the debtor has failed to abide the final order, or has in any way been guilty of a breach of the condition of his recognizance.

In the present case no final order was ever in fact made. The defendant continued his attendance before the magistrate whenever and as long as he was required to do so; and when the proceedings of the magistrate ceased, neither the execution nor the officer was present; and the debtor therefore necessarily continued free and unmolested. It was through no fault of his, either in making default, or in manifesting an unwillingness to abide the final order, that he was not again taken upon the execution. There was therefore no forfeiture of his recognizance, and of course the present action against him cannot be maintained. *Judgment for the defendants.*

JONAS WYETH *vs.* SAMUEL W. RICHARDSON.

Exceptions do not lie to the discharge of a prisoner on *habeas corpus* by a single judge.

HABEAS CORPUS. The petitioner was arrested under a warrant issued against him by the governor of Massachusetts on the requisition of the governor of Iowa. After the issuing of this writ, the governor revoked his warrant, and the prisoner

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demanded his discharge. The respondent contended that the governor had no power to revoke such a warrant once issued. But *Bigelow*, J. ruled otherwise, and discharged the prisoner. The respondent alleged exceptions.

J. C. Park, for the respondent.

R. Choate & J. A. Andrew, for the petitioner.

Shaw, C. J. The general principles of law are opposed to the allowance of exceptions in this case. The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty. The allowance of exceptions would be inconsistent with the object of the writ. The consequence of allowing exceptions must be, either that all further proceedings be stayed, which would be wholly inconsistent with the purpose of the writ; or that the exceptions must be held frivolous, and judgment rendered *non obstante* for the discharge of the party, in which case the exceptions would be unavailing. The allowance of exceptions being thus inconsistent with the very purpose of the writ, the conclusion must be that the exceptions do not lie.

Section 26 of chapter 81 of the Revised Statutes, authorizing any question of law arising "in any trial or other proceeding, either of a civil or criminal nature, at law or in equity," before this court when held by one justice, to be reserved and reported for the consideration of the full court, applies to another class of cases. The right to except to the opinion of one judge in cases of divorce stands on the special provision of Rev. Sts. *c.* 76, § 7.

In the present case, we do not mean to intimate that the party was not rightly discharged from custody, nor that the executive could rightfully revoke a warrant issued for the arrest of a fugitive from justice from another state. Not being within the jurisdiction of the court, we pass no judgment on that question.

Power given to a judge in vacation in cases of *habeas corpus* may be exercised without being in court or making the case a matter of record. It is a special power, conferred by statute, to be used by a judge as judge, not as a court; though if the court is in session when the writ is returned, the judge may

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adjourn the case into court. Rev. Sts. c. 111, § 9. There is no appellate power over such decisions made at chambers by a justice of this court. For similar cases in the supreme court of the United States, see *In re Metzger*, 5 How. 176; *In re Kaine*, 14 How. 103.

The court will exercise no appellate jurisdiction; but where they have authority to issue the writ, if upon its return it appears that the party is committed by a court of competent jurisdiction under a regular process, this court will not inquire into the regularity of the judgment on which he is committed.

A more particular examination of the provisions of the statute confirms our conclusion that these exceptions must be dismissed. The writ of *habeas corpus* is to be issued "without delay," and returnable "forthwith," either before this court or before any one of the justices thereof. Rev. Sts. c. 111, § 4. "The court or judge shall, without delay, proceed to examine the causes of the imprisonment or restraint." § 18. "The court or judge shall proceed, in a summary way," to examine the causes of the imprisonment or restraint, and to hear all parties for or against it, "and thereupon to dispose of the party as law and justice require." § 21. *Exceptions dismissed.**

GEORGE REED & another *vs.* ALONZO F. NEALE.

A grocer's stock in trade is not exempt from attachment under *St.* 1855, *c.* 264.

ACTION OF TORT by grocers against a deputy sheriff for attaching their stock in trade on mesne process against them.

At the trial in the superior court of Suffolk at March term 1856 the plaintiffs claimed that the property was exempt from attachment under *St.* 1855, *c.* 264. But *Abbott*, J. instructed the jury

* See *St.* 1859, *c.* 196, §§ 27, 38, 58.

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"that, it being admitted that the plaintiffs were not mechanics and did not hold the attached property for their use in any mechanical business or avocation, but were traders and held the attached property for sale and use as traders, they could not in any event recover." The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

H. M. Parker, for the plaintiffs.

I. W. Beard, for the defendant, was not called upon.

By the Court. This case is covered by previous decisions. The plaintiffs' stock was liable to attachment. *Smith* v. *Gibbs*, 6 Gray, 298. *Wilson* v. *Elliot*, 7 Gray, 69. *Gibson* v. *Gibbs*, 9 Gray, 62. *Exceptions overruled.*

Charles Coburn *vs.* Boston Papier Maché Manufacturing Company.

Proving a claim against a corporation in insolvency under *St.* 1851, *c.* 327, and receiving a dividend thereon, will not bar a suit against the corporation for the rest of the debt.

Action of contract on three promissory notes. Trial and verdict for the plaintiff in the superior court of Suffolk at May term 1856, before *Nash*, J., who signed a bill of exceptions, the material parts of which appear in the opinion.

C. G. Thomas, for the defendants, cited Angell & Ames on Corp. §§ 638, 779, and cases cited; Grant on Corp. 304, 305; *Greeley* v. *Smith*, 3 Story R. 657; *Slee* v. *Bloom*, 19 Johns. 474, 475, 477; *Mayor &c. of Colchester* v. *Brooke*, 7 Ad. & El. N. R. 383; *The King* v. *Pasmore*, 3 T. R. 221, 222; *Regina* v. *Mayor &c. of Tregony*, 8 Mod. 129; *Dearborn* v. *Ames*, 8 Gray, 1; *St.* 11 & 12 Vict. *c.* 45.

B. Dean, for the plaintiff, was stopped by the court.

Shaw, C. J. The defendants are a manufacturing corporation, and this suit is upon three promissory notes, of which the company are promisors. It appears by the answer that the corporation were placed in insolvency under the *St.* of 1851, *c.* 327; that the proceedings were regularly commenced

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and conducted before a commissioner of insolvency for the county of Norfolk, debts were proved, assignees chosen, the assignment made, and one dividend declared of twenty eight per cent. The plaintiff proved the debt now sued, and received a dividend. The defendants rely upon these facts as affording a defence to the suit.

But the statute makes no provision for any discharge of the insolvent corporation, and this is the characteristic distinction between this and the insolvent law of the Commonwealth in case of individual insolvent debtors. The reason for this distinction is not very apparent; probably the reason is, that after the whole of the property of a corporation is sequestered, and even the franchise, if that is of value, a judgment against the corporation, so far as the corporation is further liable, would be worthless. If there be a collateral liability, by statute or by special agreement or undertaking on the part of any other party, such liability would be in the nature of a suretyship, and so a discharge of the principal debtor would not, by the general principles of the insolvent law, discharge or release such suretyship. But if there be persons so situated as contingent sureties, rendering it necessary first to get a judgment against the corporation, as individual stockholders, sureties on bonds to dissolve attachments, or the like, then the corporation have no justifiable ground for saying that such creditors shall not avail themselves of such contingent liability by a judgment against the corporation for the unpaid balance of their debt. Of course, whatever the creditor obtains by way of dividend must first be deducted; and the other parties are to be pursued under this limitation, that no creditor shall receive from all such sureties and parties more than one full satisfaction and all costs.

The defendants' counsel contends and argues that, though they have appeared by attorney in this suit and answered, yet that the proceedings in insolvency amount to a total extinguishment of the corporation, and that the suit must therefore necessarily abate. But the court are of opinion, that there are no provisions in the statute and no circumstances in the case to warrant this conclusion. There is nothing in the proceedings

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to prevent their continuing to accomplish the end and purpose of their existence, at least until their franchise, or right to act as a corporation, is sold under one of the provisions of the statute, if indeed such sale would have the effect. In general, such a franchise under such circumstances would be of little or no value; though circumstances may exist which would give it some value.

The corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all their debts; and then no impediment would exist, before a surrender pursuant to law, or a forfeiture ascertained and declared by a proper judicial proceeding, from resuming their business. Or if their capital is impaired or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital, and then proceeding to use their corporate powers.

But a strong reason why these proceedings do not work a dissolution is, that if the legislature had so intended they would have so declared. *Exceptions overruled.*

JOHN WETHERBEE, JR. *vs.* RICHARD MARTIN & another.

The assignee of an insolvent debtor may maintain an action in his own name upon a bond for the liberty of the prison limits, made to the insolvent after the appointment of the assignee, to obtain a release from arrest on an execution issued before such appointment, upon a judgment on a debt which would pass to the assignee by the assignment.

A minute upon a magistrate's book of a continuance of the examination of a poor debtor, not in the magistrate's handwriting, nor signed by him, and of which he has no independent recollection, is not sufficient evidence of a legal adjournment of the hearing.

ACTION OF CONTRACT, by the assignee in insolvency of John M. Way, upon a bond for the liberty of the prison limits, made to said Way by Richard Martin as principal and Jeremiah Martin as surety on the 27th of March 1855, after the arrest of Richard on an execution issued on the 12th, on a judgment recovered against him by Way on the 7th of March.

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At the trial in the superior court of Suffolk at May term 1856, before *Nash*, J., the defendants contended that Richard Martin had been duly discharged by taking the poor debtors' oath.

The plaintiff introduced an assignment to him from a commissioner of insolvency, dated March 8th 1855, of all the estate which Way had, or was interested in or entitled to, on the 10th of February 1855, being the date of the first publication of the notice of Way's insolvency, and before which the debt had accrued and been put in suit on which Richard Martin was committed.

The defendants contended that, as the bond declared on was given long after said assignment, the plaintiff had no interest therein, and could not maintain the action; and moved for a nonsuit. But the judge overruled the motion, and ruled that the plaintiff, as assignee, was entitled to sue on the bond in his own name.

A justice of the police court of Boston, who administered the poor debtors' oath to Richard Martin, being called as a witness for the defendants, testified "that he kept no record; but that it appeared from certain minutes on a loose piece of paper (copied into a poor debtors' book) that said Martin applied to him to administer the poor debtors' oath; that the parties appeared on the 27th of April 1855 at twelve o'clock, and the case was continued to May 4th at nine o'clock in the morning; and then there was an entry on said piece of paper, 'Con. May 7, 12 clk,' at which time the oath was duly administered and a certificate granted; that he had no independent recollection about the case, and could testify nothing except from this writing; that after reading said memorandum he had no independent nor any recollection; that he had no doubt the adjournment was duly and properly made; but that he had so many cases of the kind, he had to rely solely on such minutes; and that this minute was not made by him." And each of the other police judges testified that this minute was not in his own handwriting.

The judge instructed the jury "that these minutes of the magistrate were not evidence; that he might refer to them to

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refresh his memory; but that as the magistrate, after examining them, had no recollection of the case, they could not be received as evidence, as they were not a record."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. Field, for the defendants.

R. H. Dana, Jr., for the plaintiff.

Dewey, J. The general rule is conceded, that the obligee in a bond is alone authorized to maintain an action thereon. But in the case of deceased persons, or those whose estates have passed into liquidation under bankrupt or insolvent laws, a modification of this rule exists. The principle of the rule is not disregarded, but the law allows the legal representative of the party to do those things which might in other cases be done by the obligee solely. Our statute of insolvency is very full and comprehensive in its terms, giving to the assignee all the property, real and personal, of the insolvent, and also all the like remedies to recover the debts and effects of the insolvent in the name of such assignee. St. 1838, *c.* 163, § 5. Under this provision, no question exists as to the right of the assignee to sue in his own name all choses in action of the insolvent that pass to the assignee, and to come in and prosecute in his name all actions pending in the name of the insolvent, that have reference to the assets for distribution.

In the present case, no question could be made of the right of the assignee to sue the bond in his own name, if it had been executed before the time of the first publication of the insolvency. The difficulty in the case arises from the fact that this bond was executed on the 27th of March 1855, and the relation of obligor and obligee between the parties to this bond arose after the party went into insolvency, and at a time when new debts to the insolvent, or contracts made with him, would not enure to the assignee for the benefit of the creditors.

Had this been in fact such new debt, accruing subsequently, and not available to the assignee for the benefit of creditors, the objection taken to maintaining the action in the name of any other person than the obligee would certainly defeat this

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action. It then becomes important to ascertain the precise nature of the present action, and to decide to whom the avails of this bond belong, and also whether the assignee has, by any act of his, deprived himself of the right to institute a suit on the same in his own name.

It appears that the insolvent, John M. Way, at the time of the institution of the insolvent proceedings, on the 10th of February 1855, had an action pending for the recovery of a demand that would pass to his assignee, and that on the 7th of March judgment was rendered in that action in favor of said Way; which was necessarily so rendered, as at that time there was no assignee, and no person who could come in and prosecute the action, for the assignee was appointed on the 8th of March. Of this judgment, thus rendered, the assignee attempted to enforce payment by the ordinary process of execution, and arrest of the body of the debtor. The debtor, when arrested, applied for the benefit of the prison limits, as he had the right to do, and complied with the provisions of law in that respect by giving a proper bond to the judgment creditor. The bond was therefore properly given. But it was a bond in the name of Way to secure the surrender of a party arrested on an execution for a debt that passed to Way's assignee, and a claim that the assignee might enforce. A suit might have been brought on such judgment in the name of the assignee; and, as it seems to us, the debt being a part of the assets of the insolvent, to be administered by the assignee, any further legal processes that might be required, in consequence of the debtor's availing himself of the prison limits, to enforce payment of the same, may be issued in the name of the assignee.

The only other exception that was urged at the argument was to the ruling of the court, that the paper introduced as minutes of the magistrate, in the proceedings in reference to taking the poor debtors' oath, was not evidence. Confining ourselves strictly to the exception as presented, and without expressing any opinion upon the weight of the independent evidence, the court are of opinion that the paper offered was not evidence of an adjournment of the proceedings before the magistrate, as it

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was not a record, nor a minute upon a docket which was afterwards to be extended into a record, nor a paper drawn up by the magistrate. *Exceptions overruled.*

ELIZA POWER *vs.* JOHN F. FENNO & another.

A bond, conditioned that the accused in a bastardy process shall appear and answer to the complaint and abide the final order of the court thereon, is discharged by his attendance at court so long as the action is pending and at the final order, and his subsequent arrest at the instance of the complainant and committal to prison under that order for a failure to give bond to perform it.

The presence of the respondent in court pending a bastardy suit, and at the passing of the final order, may be proved by parol evidence.

ACTION OF CONTRACT on a bond, given pursuant to Rev. Sts. *c.* 49, § 1, and conditioned that John Donahue should appear at the next court of common pleas and answer to the complaint of Eliza Power, of being the father of her bastard child, and should abide the order of said court thereon.

At the trial in the superior court of Suffolk at May term 1856, it appeared that the complaint was tried and Donahue found guilty in the court of common pleas on the 2d of March 1855, and the final order of court passed on the same day; that the court adjourned on the 13th, and on the 25th of March a warrant was issued on the complainant's motion, upon which Donahue was arrested and committed on the 28th, and, at the expiration of one hundred and twenty days, discharged on taking the poor debtors' oath.

The defendants offered evidence that during the trial of the complaint and at the passing of the final order Donahue was present in court. The plaintiff objected, upon the ground that this evidence, if relevant for any purpose, was so only to show a surrender in court, which could not be proved except by record. But *Nash*, J., admitted the evidence; and instructed the jury, "that if the respondent was openly in court during the trial, and at the time of and until after final judgment, when the final order was passed; and his presence was known to the com-

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plainant and her attorney; and the respondent was then and there ready to be taken into custody, if such motion had been made by the complainant; the condition of the bond was saved, and the verdict should be for the defendants." The jury returned a verdict accordingly, and the plaintiff alleged exceptions.

J. Q. A. Griffin, for the plaintiff.

S. C. Maine, for the defendants.

SHAW, C. J. The obligation of Donahue was to appear in court and abide the order. It appears that he was there personally present when the order was made. He was committed, either then or afterwards, in pursuance of that order. It was by the act of the complainant that he was so committed, and she is estopped to say that he did not abide the order of the court to pay or be committed. *Exceptions overruled.*

MARY DOHERTY *vs.* JOHN L. BROWN.

A declaration in slander for charging the plaintiff with being "a whore and a common prostitute" is not supported by proof of other words amounting to a general charge of unchastity.

SLANDER. The declaration averred: 1st. "That the defendant publicly, falsely and maliciously accused the plaintiff of the crime of fornication, by words spoken of the plaintiff substantially as follows; viz: 'That you' (meaning the plaintiff) 'are a whore and a common prostitute, and you' (meaning the plaintiff) 'associate with prostitutes.'" 2d. "That the defendant publicly, falsely and maliciously accused the plaintiff of the crime of fornication, by words spoken of the plaintiff substantially as follows: 'She' (meaning the plaintiff) 'is a whore, a damned whore, and a common prostitute.'"

At the trial in the superior court of Suffolk at March term 1856, *Nelson*, C. J., instructed the jury, "that the plaintiff, to obtain a verdict on the first count, need not prove the identical

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words set forth and specified therein, if other words were proved to have been said by the defendant and concerning the plaintiff, amounting to a general charge of unchastity, which would be enough to support that count." The jury returned a general verdict for the plaintiff, and the defendant alleged exceptions.

H. C. Hutchins, for the defendant.

T. Willey, for the plaintiff.

THOMAS, J. The instruction of the court "that the plaintiff, to obtain a verdict on the first count, need not prove the identical words set forth and specified therein, if other words were proved to have been said by the defendant of and concerning the plaintiff, amounting to a general charge of unchastity," was erroneous.

1st. The words set out in the declaration must be, if not precisely, yet substantially proved. The object of this mode of pleading is to give notice to the defendant of what is to be proved, not merely the nature of the charge, but the language in which it was uttered. The evidence therefore must show the charge to have been made substantially as alleged, so far even as the words are concerned. It cannot be shown that the same charge was made, but in another form, and in the use of substantially different language. Such a rule would wholly defeat the purpose of the statute in requiring the words of the charge to be spread upon the record.

2d. The proof of making a charge of unchastity against the plaintiff does not sustain the allegation in the first count that the defendant charged the plaintiff with being a common prostitute. They are not the same charge. Supposing the words as set out to have been proved, it is plain that proof of the unchastity of the plaintiff would not be a justification of the charge made.

3d. The jury having found a general verdict on the two counts, the instruction cannot be deemed immaterial. They are not two different modes of stating one and the same slander, but two charges of slander; not one cause of action in different counts, but different causes of action in different counts.

Exceptions sustained.

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CHARLES SMITH & another *vs.* JOHN PHILBRICK.

The presentment of a promissory note at the place of its date is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere.

MERRICK, J. This is an action brought by indorsers against a prior indorser to recover the contents of a promissory note. At its maturity the holder placed it in the hands of a notary public, who by his direction went with it to the place of business which the maker formerly occupied in the city of Boston, and there made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action cannot be maintained.

The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then and has ever since resided at Port Lavacca in the State of Texas, where he had his only place of business. At the trial, no evidence was produced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston, or elsewhere; there was no evidence whatever upon that question.

The indorser of a note is certainly never chargeable with its payment, if there has been neither a demand of payment made on the maker, nor due diligence used to find him for the purpose of presenting it to him for payment. The inquiry then is, whether, under the particular circumstances of this case, due diligence is shown to have been used to find the maker, so that the note could be presented to him and its payment demanded. What was it the duty of the holder to do? It is laid down by Chancellor Kent as a general rule, that "if there be no other evidence of the maker's residence than the date of the paper, the holder must make inquiry at the place of the date;" and he adds that "the presumption is, that the maker resides where the note is dated, and that he contemplated payment at that

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place." 3 Kent Com. (6th ed.) 96. Story on Notes, § 236. *White* v. *Wilkinson*, 10 Louis. Ann. R. 394.

Assuming this to be the rule, there is no doubt that due diligence was used by the holder. He was not required to carry or to send his note to Port Lavacca for presentment; but only to make all proper inquiries at the place where it bore date to find the maker. Those inquiries were made with sufficient fulness and carefulness at Boston. It is not pretended that any thing was omitted, which, if done, would have been of the least utility in collecting the note, or protecting the rights of the indorser. Any further inquiry beyond that which was made by the notary would necessarily have been wholly fruitless.

If the place of the maker's residence had been known by the holder at the maturity of the note, it might perhaps have been incumbent on him to have forwarded it to Port Lavacca for presentment, or to have used all due diligence to have done so. That would be in conformity to the decision of the court in the case of *Taylor* v. *Snyder*, 3 Denio, 145, which is relied on by the defendant. In that case it appeared that the plaintiff well knew the maker's place of residence, which was out of the state where the note was made and dated; and it was held, that under such circumstances the indorser was discharged, because there was no demand of payment on the maker, and no inquiries or efforts were made to find him, except at the place where it bore date, in order to present the note to him for payment.

This fact of knowledge of the place of the indorser's residence distinguishes the present from the case of *Taylor* v. *Snyder*, and leaves it to be determined upon the general rule laid down by Chancellor Kent. The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party

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may controvert this presumption and overcome it by proofs introduced. But no evidence to the contrary having been laid before the court, this presumption is to stand; and the

Defendant's exceptions must be overruled.

B. Dean, for the defendant, cited *Taylor* v. *Snyder*, 3 Denio, 145; *M'Gruder* v. *Bank of Washington*, 9 Wheat. 598; *Wheeler* v. *Field*, 6 Met. 290; *Bank of Orleans* v. *Whittemore*, 20 Law Reporter, 333; *Heylyn* v. *Adamson*, 2 Bur. 676; *Freeman* v. *Boynton*, 7 Mass. 483; *Warren Bank* v. *Parker*, 8 Gray, 221.

T. F. Nutter, for the plaintiffs.

THOMAS TREMLETT *vs.* ROBERT HOOPER & others.
JAMES PARSONS *vs.* SAME.
SOMERSET POTTERS WORKS *vs.* SAME.

If a partnership, whose principal business is to purchase supplies for and sell iron manufactured at iron works owned by one of the partners, becomes insolvent, a claim for supplies sold and delivered to the partnership, without knowledge that that partner only was interested in the works in which they were to be used, can be proved against the partnership estate only, under *St.* 1838, *c.* 163, § 21, and not against the separate estate of that partner.

APPEALS from decrees of a master in chancery, under proceedings in insolvency commenced on the 24th of November 1847, in the matter of the estate of Horace Gray and Nathaniel Francis, partners and insolvent debtors, whose assignees the appellees were, disallowing claims offered for proof against Gray's separate estate.

The cases of Tremlett and the Somerset Potters Works were submitted to the judgment of the court upon agreed statements of facts.

The case of Parsons was tried before *Merrick*, J., a verdict taken by consent for the appellees, and the case reserved for the whole court, with an agreement that if upon the evidence, and upon drawing just inferences, the jury under legal instructions could properly have returned a verdict for the appellants,

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there should be a new trial; otherwise, judgment upon the verdict.

So much of the facts of each case as is necessary to the understanding of the questions of law decided, is stated in the opinion. The cases of Parsons and the Somerset Iron Works were argued at March term 1856, and Tremlett's at this term.

S. E. Sewall, R. Choate & C. W. Loring, for the appellants, cited 2 Kent Com. (6th ed.) 631; Story on Agency, §§ 160 *a*, 266, 267, 291, 292, 446, 449, note; Paley on Agency, (4th Amer. ed.) 243, 247 & note; *Nelson* v. *Powell*, 3 Doug. 410; *Railton* v. *Hodgson*, 4 Taunt. 576; *Kymer* v. *Suwercropp*, 1 Campb. 109; *Thomson* v. *Davenport*, 9 B. & C. 78; *Higgins* v. *Senior*, 8 M. & W. 843; *Beckham* v. *Drake*, 9 M. & W. 95; *Hyde* v. *Wolf*, 4 Louisiana, 234; *Upton* v. *Gray*, 2 Greenl. 373; *Perth Amboy Manuf. Co.* v. *Condit*, 1 Zab. 659; *French* v. *Price*, 24 Pick. 21, 22; *Raymond* v. *Crown & Eagle Mills*, 2 Met. 319; *Sprague* v. *Gillett*, 9 Met. 91; 1 Bell Com. (4th ed.) § 418; *Rich* v. *Coe*, Cowp. 636; *Wilson* v. *Hart*, 7 Taunt. 295; *Precious* v. *Abel*, 1 Esp. R. 350; *Conro* v. *Port Henry Iron Co.* 12 Barb. 53; *Melledge* v. *Boston Iron Co.* 5 Cush. 170; *Porter* v. *Talcott*, 1 Cow. 359; *Ex parte Seddon*, 2 Cox Ch. 49; *Zerrano* v. *Wilson*, 8 Cush. 424; *Alcock* v. *Hopkins*, 6 Cush. 484; *Butts* v. *Dean*, 2 Met. 76; *Denston* v. *Perkins*, 2 Pick. 86; *Chesterfield Manuf. Co.* v. *Dehon*, 5 Pick. 7.

S. Bartlett & C. B. Goodrich, for the appellees.

Dewey, J. It is conceded that Tremlett, the appellant in one of these cases, in June 1847 made a contract with Horace Gray & Co. for the sale to them of a large quantity of coal, for which they were to pay by giving their notes payable in four months, and that he gave credit to the partnership and treated with them as the vendees of the coal, and the party from whom alone he expected payment therefor. The goods were delivered, and the notes received therefor as stipulated.

No question is made of the liability of Horace Gray & Co. on these notes, nor of the right of the appellant as their creditor to file his claim, and receive his *pro rata* dividend. But in the settlement of the estate of Horace Gray & Co. and of Horace

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Gray alone, under the insolvent laws, it has been found that the private estate of Horace Gray will pay a much larger dividend to its appropriate creditors than the partnership assets will pay to the partnership creditors. The appellant desires therefore to withdraw his proof heretofore made against the partnership estate, and prove his claim against the separate estate, and thus change his relation from that of a creditor of the partnership to that of a creditor of Horace Gray alone.

In support of his right so to do, he asserts and endeavors to maintain the position that Horace Gray was a concealed principal at the time of making the contract and the delivery of the coal, and Horace Gray & Co. were only agents; and that upon the discovery of that fact, before unknown to him, he may resort to such concealed principal.

As a case for the application of the familiar principle of resorting to a concealed principal who has acted through an agent, with a view of charging thereby a third person not known in the original contract, the case has this peculiar feature; that Horace Gray, the alleged concealed principal, was one of the agents dealt with, and was personally liable upon the express contract; and, independently of the provisions of the insolvent law, and the fact that Horace Gray & Co. and Horace Gray are the subjects of proceeding under that law, the private estate of Horace Gray would, under the contract as made and in the form it was made, have been to the full extent liable on the notes given.

But assuming that it is open to the appellant to show that Horace Gray alone was the real purchaser, we are brought to the inquiry whether that fact is established by the evidence.

To some extent this subject has been considered by this court in the case of *Somerset Potters Works* v. *Minot*, 10 Cush. 592. It is to be considered as settled that there was such a legal copartnership as Horace Gray & Co., consisting of Horace Gray and Nathaniel Francis. It was a partnership transacting partnership business in some respects in a manner peculiar. The profits of the firm were in the form of commissions to the amount of nine thousand dollars for their duties as con-

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nected with various establishments. They transacted business as a firm, bought and sold as a firm, and used the partnership name in the securities given for the purchases made to supply these various establishments. The copartnership did not own or lease any of these various establishments, but undertook to furnish the supplies through purchases made on their own account. It was seriously questioned in earlier cases whether there really was any copartnership, or whether the purchases were not by Horace Gray alone, or by those who owned or carried on the establishments for which coal and iron were furnished. Upon much consideration, the court came to the opinion that there was such a copartnership, and that there attached to it the usual incidents of a copartnership, vesting in them all the property thus purchased by them, and creating the same liabilities to their creditors that arise in ordinary cases. Hence the fact that the merchandise purchased was found to have been required to supply a particular establishment was not supposed to make such establishment the principal debtor, and Horace Gray & Co. the agents of a concealed principal. The cases of principal and agent were not considered as applicable to the purchases by Horace Gray & Co. The firm were the principals in the purchases. Hence it was held, that as to articles furnished to supply the wants of third persons, Horace Gray & Co. were the principals; and that coal or iron furnished through them to the Massachusetts Iron Company was not properly chargeable to the latter, although it went directly to their use. *Bevan* v. *Massachusetts Iron Co.* Suffolk, March term 1852. It is true that the purchase in that case was with reference to supplying various works, but the precise claim was solely for that which went to the use of the Massachusetts Iron Company.

The only point of distinction, that is material to be considered, arises from the fact that the alleged concealed principal in the present case is Horace Gray, the same individual who was a member of the firm of Horace Gray & Co.; and an attempt is made to distinguish the case on that account, and thereby create an original liability on the part of Horace Gray as sole debtor.

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As a member of the firm of Horace Gray & Co. Horace Gray is of course liable as an original purchaser, and all his property is bound for the payment of his various debts. But the inquiry is whether this was a partnership liability, or an individual liability? Now, as it seems to us, the character of the business of Horace Gray and Nathaniel Francis having been decided to be that of a copartnership, whose leading business it was to supply various establishments with coal and iron, such purchases, so made by them to effect that object, were alike partnership purchases, whether the articles were purchased by them to supply the Massachusetts Iron Company, or the Ulster Iron Works carried on by Horace Gray. In both cases the partnership made the purchases upon their own orders, gave their own negotiable notes for them, and in some form charged the party to whom such articles were delivered therefor. The books they kept were the books of Horace Gray & Co.; not the books of the Massachusetts Iron Company, or Horace Gray, kept by their agents. The notes they gave in the present instance were given on account of deliveries of coal, part of which went elsewhere than to Horace Gray's works at Pompton and Saugerties. The plaintiff had from time to time theretofore sold to Horace Gray & Co. large quantities of coal for the various purposes for which they required them, and was the holder of their notes therefor to a large amount, which are not claimed to be allowed against the estate of Horace Gray.

We do not perceive any sufficient reason for withdrawing that portion of the indebtedness of Horace Gray & Co., which arises from that portion of the coal forwarded directly to Saugerties for the Ulster Iron Works, or at Newark for the Pompton Iron Works, from the other sales made for other establishments. The dealings in both cases were with the copartnership, and so understood to be, and secured to the vendors all the benefits arising therefrom. They might have been much greater than those accruing from the separate liability of Horace Gray It happens that the situation of the property is such that it is otherwise. In the opinion of the court, upon the case stated, the master in chancery properly refused to allow the demand

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of Tremlett as a claim against the separate estate of Horace Gray.

In the case of Parsons, as in that of Tremlett, the creditor puts his case substantially upon the ground of a concealed principal, assuming that Horace Gray & Co. were merely agents for Horace Gray in making the purchases from the appellant of the bricks for which he seeks to recover against the separate estate of Horace Gray. In the view we have taken of the facts, such was not the real character of the transaction. The firm of Horace Gray & Co. were a real firm doing business as such, and making extended purchases for supplying the calls of those who looked to them for their supply. It is true in the present case that the bricks were bought of Parsons for the works at South Boston, and were used there, and that the firm had no interest as owner or occupant of those works. The same was true of all the various establishments which they supplied. But nevertheless they undertook a general business of purchasing on their own account large amounts of merchandise, charging over to those who had the same the proper indebtedness therefor on their partnership books.

In the case of Parsons, the contract was made in writing with the partnership, the account was rendered to the partnership, and agreeably to the terms of the contract, on the delivery of the bricks, one half of the amount due therefor was paid in cash by the firm out of the funds of the firm, and a partnership note payable in three months given for the balance. That the bricks were to be delivered at the Massachusetts Iron Works at South Boston does not vary the character of the transaction. We perceive no reason for coming to a different conclusion in the present case from that to which we have come in Tremlett's case. In our opinion, upon all the proposed evidence that was competent and admissible, and under proper instructions, the jury could not properly have returned a verdict for Parsons.

The case of the Somerset Potters Works is the same in principle as that of Parsons. The only difference is that, in relation to a small portion of the bricks delivered, no promissory note had been given, and as to so much of the demand, that

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objection cannot be urged. But all the bricks were delivered upon the written orders of Horace Gray & Co., and charged to them upon the books of the appellants. The entire cause of action is of similar import as to its substantial foundation and the real parties to it. The result must be therefore that the appellant's demand is not provable against the separate estate of Horace Gray. *Decrees affirmed.*

WILLIAM L. FISHER & another *vs.* WILLIAM MINOT, Master in Chancery.

Materials charged and shipped by a partnership in their usual course of business, to works of one partner, on the day of the failure of all the partners, are to be treated as the property of that partner, and not of the partnership, in marshalling their assets in insolvency, under St. 1838, c. 163, § 21.

PETITION in equity under *St.* 1838, *c.* 163, § 18. The arguments were made at March term 1856. The case is stated in the opinion.

J. L. English, for the petitioners, cited *St.* 1838, *c.* 163, § 21; *Swain* v. *Sheppard*, 1 M. & Rob. 223; *Cooper* v. *Smith*, 15 East, 103; *Wright* v. *Dannah*, 2 Campb. 203; *Woodbury* v. *Long*, 8 Pick. 543; *Kendall* v. *Samson*, 12 Verm. 515; *Sackett* v. *Lowell*, 32 Maine, 164; *May* v. *Gentry*, 4 Dev. & Bat. 117; *Tooke* v. *Hollingworth*, 5 T. R. 215; *Atkin* v. *Barwick*, 1 Stra. 165; *Bourne* v. *Cabot*, 3 Met. 305; *Martin* v. *Pewtress*, 4 Bur. 2477; *Shumway* v. *Rutter*, 7 Pick. 56; *Lanfear* v. *Sumner*, 17 Mass. 110; *Shurtleff* v. *Willard*, 19 Pick. 202.

S. Bartlett & C. B. Goodrich, for the assignees, were stopped by the court.

E. R. Hoar, for intervening creditors.

SHAW, C. J. This is a petition in the nature of an appeal from the decision of the master in chancery, disallowing the claim of the petitioners against the separate estate of Horace Gray. Various points were raised upon the case stated; but at

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the argument all were waived except the one stated in the last paragraph of the agreed statement.

It appears by the agreed statement that Horace Gray alone was carrying on a separate business in the manufacture of iron at Pembroke in the State of Maine; that about the time of the failure, November 20th 1847, the firm of Horace Gray & Co. shipped from Boston, in pursuance of a previous course of business, on board of Schooners Lucy and Yeso two cargoes of iron, which arrived at Pembroke, and were sold by the assignees as part of the estate of Horace Gray, and credited to the separate estate $3592.24. The same was charged in the books of Horace Gray & Co. to "Pro. Pemb. Iron Works," in the same manner as other pig iron and coal thus charged, which had previously been sent to said Pembroke Iron Works.

The claim is to require the assignees to reform their account by crediting this sum to the account of Horace Gray & Co. and not let it stand, as the assignees have placed it, to the credit of the separate estate of Horace Gray.

This claim is founded on the ground that at the time of the first publication these cargoes of iron, acknowledged to have been property of Horace Gray & Co. to near the time, had not been appropriated and set apart to the separate use of Horace Gray, but remained the property of the company.

It is plain that the course of business was for Horace Gray & Co. to purchase pig iron, as they could most advantageously; and when sent to either of Mr. Gray's iron works, to charge it to iron works named, but in effect to him personally, using such names of his works as to enable him to know which establishment in particular they were sent to.

It being conceded that this iron was the property of the firm up to the day or nearly the day of failure, the question is, whether the acts then done were sufficient to constitute an actual appropriation, so as to transfer the property from the firm to the partner.

The same rules substantially must govern this case, which govern the sale of personal property. In the absence of a fraudulent purpose to affect the rights of third parties — and there is

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no room for imputing any such purpose here — we think the evidence shows what would amount to a sale and delivery. It was actually put on board vessels either provided by Mr. Gray, or by his appointment, in pursuance of his order or that of his agent. An agreement for a sale and delivery to a carrier, either a common carrier or a carrier appointed by the purchaser, is a good delivery, and transfers the property. It was shipped on or before the 20th of November, charged on the 20th, and the day of first publication was the 25th. The court are of opinion, that this iron, whilst *in transitu* and on its arrival, was the separate property of Mr. Gray, and as such it was sold with the other property of the Pembroke Iron Works, and the proceeds carried to the credit of his separate estate. The claim therefore to have this credit transferred to the credit of the estate of Horace Gray & Co. was rightly rejected.

The only real question is, when, according to the course of business, did the specific property in the iron pass from Horace Gray & Co. to Horace Gray? It is contended not till arrival at Pembroke. The word "shipped," in common maritime and mercantile usage, means "placed on board of a vessel for the purchaser or consignee, to be transported at his risk"; and such a delivery is a constructive delivery to the purchaser. It makes no difference that it was to be paid for by the proceeds of the sales at a future time. The charge was on the 20th. The shipment was on or before the 20th. If on that day, it preceded the shipment. "Shipment" means delivery on board. If done on the 20th, the natural inference is that it was in pursuance of arrangements previously made by the engagement of the vessel. "Shipped" implies a past fact, placed, separated, set apart; this is all that was necessary to make it the property of Horace Gray.

There is nothing to show that it was sent at the risk of Horace Gray & Co., or that they paid the freight or insurance. If they did, they charged it in the same account. So that it was not at the risk of the firm from the time of shipment.

Decree affirmed.

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William Thomas & others *vs.* William Minot, Master in Chancery.

Under *St.* 1838, *c.* 163, § 21, where a partnership and its members are in insolvency under one commission, and the separate estate of one partner is more than enough to pay his separate debts, the surplus of that estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts, before paying interest on the separate debts.

Petition in equity, under *St.* 1838, *c.* 163, § 18, in behalf of all the creditors of Horace Gray and Nathaniel Francis, late copartners in business under the firm of Horace Gray & Co., insolvent debtors, to reverse an order by which the respondent, as a master in chancery, allowed out of Gray's separate estate the whole amount of the claims proved against that estate, with interest to the time of the order. It appeared, by the accounts of the assignees, that there was a balance of assets from Gray's separate estate, more than sufficient to pay all the claims allowed against it, including interest from the day of the first publication of notice to the time of the order; and that the assets of the partnership estate were insufficient to pay the debts allowed against it, without interest. Upon these facts the parties submitted the case to the decision of the court.

E. R. Hoar, for the petitioners. By § 3 of the *St.* of 1838, *c.* 163, the time of the first publication is fixed as the point of time to which interest is to be computed, and from which interest is to be discounted upon debts not then payable. By § 21, it is provided, that the separate estate shall be appropriated to pay the separate creditors, and the joint estate to pay the joint creditors; and if there shall be any balance of the separate estate of any partner, after payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors. As between creditors, or separate classes of creditors, "debts" means debts provable and proved under the provisions of the insolvent laws.

The provisions of the insolvent laws for distributing the

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assets of insolvent debtors between creditors of a partnership and separate creditors, are, to a considerable extent, arbitrary; change, in important particulars, their common law rights; but are adhered to by the courts, without reference to particular cases of hardship. In the case of this very estate, their strict and literal enforcement has operated most injuriously to the partnership creditors, and those creditors are surely entitled to any slight compensating advantage. *Howe* v. *Lawrence*, 9 Cush. 553. *Somerset Potters Works* v. *Minot*, 10 Cush. 596, 597.

At common law, the partnership creditor could attach the separate property of the partner, and thus gain a priority over a separate creditor. *Allen* v. *Wells*, 21 Pick. 450. Under the insolvent law, a partnership creditor may have attached separate property, and thus secured it to the assignees, when his attachment is dissolved by the insolvency. *Purple* v. *Cooke*, 4 Gray, 120.

There is no provision in the insolvent law, contemplating that the estate shall gain anything by interest, and the assignees have no right to invest it for that purpose. St. 1838, *c.* 163, § 11. There is no provision for interest on preferred debts, or on costs in a suit by which property is held, so as to come to the possession of the assignee. Would those be entitled to interest till the date of distribution? The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate. *Williams* v. *American Bank*, 4 Met. 328.

If interest could be allowed to separate creditors after the day of first publication, the question whether an insolvent should receive a discharge, or receive an allowance from his estate, might be affected by a delay over which he had no control. Sts. 1844, *c.* 178, § 4; 1848, *c.* 304, § 9; 1838, *c.* 163, § 8. *Baker's case*, 8 Cush. 109.

Interest after breach of contract, or action brought, is in the nature of damages; and there are no damages between different classes of creditors, parties to the same proceeding, to be regarded as arising from the delays necessarily incident to such proceeding. *Barringer* v. *King*, 5 Gray, 9. As an incident of the debt, at what rate of interest should the interest be cast,

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when the debts have been contracted at different rates of interest, under different jurisdictions?

This case is distinguishable from questions arising between all the creditors and the debtor, where the debtor proves to be in fact solvent, and able to pay all his debts with interest; whereas here the question concerns the respective rights of creditors in a particular fund, out of which, whether created by statute or contract, they are not entitled to interest as against each other. *Brown* v. *Lamb*, 6 Met. 203. *Williams* v. *American Bank*, 4 Met. 319, 320. *Buffum* v. *Deane*, 4 Gray, 388, 389.

The English rule in bankruptcy under a similar statute was not to allow interest to separate creditors, out of a surplus from the separate estate, until the joint creditors had been paid their debts as proved. *Ex parte Clarke*, 4 Ves. 677. *Ex parte Reeve*, 9 Ves. 590. St. 6 Geo. 4, *c.* 16, §§ 62, 132. *Ex parte Minchin*, 2 Glyn & J. 287. *Ex parte Rix*, Mont. 237. *Ex parte Wood*, 2 Mont., Deac. & De Gex, 283. Those decisions are to be followed in construing our statute. *Commonwealth* v. *Hartnett*, 3 Gray, 450.

S. Bartlett & C. B. Goodrich, for separate creditors of Gray. The basis of the rule established by St. 1838, *c.* 163, § 21, to apply the separate estate in the first instance to the payment of the separate debts, and the partnership estate to the payment of joint debts, is that each fund is appropriated to the payment of the debts contracted upon the faith of that property. The statute shows that the legislature contemplated the possibility of a surplus as between the two estates. The same equity extends to the payment of the interest as of the principal. It would be unjust to take away the interest from a creditor who has been kept out of his property without any fault of his own.

When interest is a part of the contract, or payable by mercantile usage, it is as much a debt as the principal, and may constitute a part of the original proof. Eden B. L. (2d ed.) 134. St. 1838, *c.* 163, § 3. Unliquidated damages are regarded as a debt in this commonwealth. *Milldam Foundry* v. *Hovey*, 21 Pick. 417.

The right of the assignees of the joint estate to receive the

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surplus of the separate estate, after payment of the separate creditors, is derived through the insolvent debtor, and cannot be greater than his right. No surplus exists until after payment of the separate creditors in full, principal and interest. 1 Cooke B. L. (8th ed.) 513, 514. Eden B. L. 391–393.

It is settled in this commonwealth that "debt" means principal and interest down to the time of distribution. *Brown* v. *Lamb*, 6 Met. 203. It is true that that case arose between creditors and the debtor's personal representatives; but the reasoning of the court rests on the rights of the creditors, and applies as well to this case as to that. "Debt" cannot mean one thing when applied to the debtor, and another thing when applied to creditors. And see 1 Amer. Lead. Cas. (4th ed.) 526, note to *Selleck* v. *French*.

In *Williams* v. *American Bank*, 4 Met. 317, there was not enough to pay the debts, and there was no question of joint debts. *Buffum* v. *Deane*, 4 Gray, 385, turned upon the construction of a peculiar contract.

A creditor who has security by mortgage or pledge is entitled to interest until paid by sale or redemption, although payment may not be made until after the first publication of notice. *St.* 1838, *c.* 163, § 3. Eden B. L. 135. [SHAW, C. J. The estate is not to have the benefit of the surplus, without paying the pledgee in full.]

The allowance to the debtor is to be paid before the question of surplus can arise. *St.* 1838, *c.* 163, § 21. The argument founded upon the possible attachment of the separate estate by a partnership creditor goes too far, and would show that the whole principle of marshalling, directed by the statute, was wrong. The application of the petitioners is, in its effect and result, a prayer that the joint creditors may be allowed to prove *pro tanto* in competition with the separate creditors against the separate estate; which cannot be allowed. *Ex parte Reeve*, 9 Ves. 588. *Somerset Potters Works* v. *Minot*, 10 Cush. 592.

The English rule in bankruptcy against allowing interest in such cases rests upon an early construction of the bankrupt act, that the whole debt, principal and interest, as of the date of the

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commission, was the debt for the payment of which it was intended to provide. By that rule the surplus, if any, went to the bankrupt. The rule itself has been repeatedly disapproved by the courts; and in the cases of most frequent occurrence has been controlled by statute. *Ex parte Boardman*, 1 Cox Ch. 275. *Bromley* v. *Goodere*, 1 Atk. 78. *Ex parte Champion*, 3 Bro. C. C. 436. *Ex parte Morris*, 1 Ves. Jr. 132. *Ex parte Mills*, 2 Ves. Jr. 300. *Ex parte Clarke*, 4 Ves. 677. *Ex parte Reeve*, 9 Ves. 588. *Lowndes* v. *Collens*, 17 Ves. 27. *Ex parte Koch*, 1 Ves. & B. 342. *Ex parte Boyd*, 1 Glyn & J. 285. *Ex parte Williams*, 1 Rose, 399. *Ex parte Cocks*, 1 Rose, 317. Eden B. L. 134, 391–394. 1 Deacon on Bankruptcy, (2d ed.) 287, 288, 292–295. *St.* 6 G. 4, *c.* 16, §§ 57, 132.

Shaw, C. J.* Distribution is to be made of the assets as they stand at the time of the dividend. The amount of assets which came from the private estate of Horace Gray is to be ascertained for purposes of distribution; and the amount of assets which came from the joint estate of Horace Gray & Co. is to be ascertained, including the interest which has accrued upon it, either by debts due to the estate drawing interest remaining unpaid, or by other increase in value of the assets.

The assets are to be distributed by comparing the separate assets with the debts of the separate creditors as proved; and if the amount is sufficient to pay the whole of the separate debts as proved, the surplus is to be added to the assets of the joint estate and distributed among the joint debts as proved. The same rule would apply if the assets of the joint estate were sufficient to pay the joint debts in full, and there was a deficit in the estate of one of the partners, leaving not enough to pay the separate debts.

As against the debtors, all being liable *in solido* to pay the partnership debts, all the creditors have a right to full payment. The difficulty arises where there is not sufficient to pay the whole.

* This case was argued on the 6th of January 1858, before all the judges except Thomas and Merrick, JJ

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The relative claims of the classes of creditors are fixed by the liquidation and allowance of the joint and separate debts; and though these allowances are in fact settled afterwards, they all relate back to the day of liquidation, being the day of first publication of notice. The debts are to be paid as they stood then, whether on interest previously or not, whether due at a future day with interest or not; and interest is added or abated so as to ascertain the debts actually due at that time.

In the case before us, the private debts as liquidated and allowed are first to be paid in full out of the separate estate. Then the balance of that estate is to be distributed among the joint creditors. If there is a surplus as against both, then before paying back that surplus to the debtor, as the creditors have a superior equity against him, that surplus would be applied in the same way; the interest accruing from the separate assets to the payment of the interest of the separate creditors from whose assets it arose; and that from the joint assets to the payment of the interest of the joint creditors. But it is hardly necessary to speculate on such a contingency. It is only alluded to to show the practicableness of the rule we have adopted.

Supposing the statute not to have made any express provision on the subject, or to leave the point in doubt, then we must ascertain the policy of the law, and in expounding the statute or supplying its deficiency we must resort to principle or to analogous cases. *Williams* v. *American Bank*, 4 Met. 317.

The result is, that the order of the master, in directing a dividend on the estate of Horace Gray & Co., allowing interest to the separate creditors of Gray out of his separate estate, be annulled and reversed; and that the master be directed to order that after the separate debts be paid in full, without interest computed, the balance, if not sufficient to pay the joint debts in full as proved, shall be distributed ratably among the joint creditors of Horace Gray & Co. *Decree accordingly.*

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Abigail Armstrong *vs.* Uriel Crocker & another.

To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales.

A bill in equity by the executrix of her deceased husband alleged that the plaintiff was inexperienced and unskilled in the care and management and in the value of property, and that the defendant undertook the general management of her affairs, volunteering his advice to her in all matters of business, and that the plaintiff had full confidence in the defendant and relied upon him to advise and aid her in her transactions, and did not buy or sell or lease property without the aid of his judgment. *Held*, that the answer sufficiently met this allegation by stating that the defendant could only refer to the plaintiff's declaration that her husband was in the habit of communicating to her his business transactions; that, although his property was large, it was such that its value and income, if not fully known, could be exactly ascertained by her upon the slightest inquiry; and that the plaintiff never expressed to the defendant any doubt of her capacity to take charge of all her property and protect all her interests, nor had he any doubt thereof; and which then stated in detail the facts of their intercourse, denying that the defendant ever acted for the plaintiff as an agent or in a confidential capacity. *Held*, *further*, that if the answer alleged that the plaintiff asked of third persons questions relative to her property, it need not state of what persons or concerning what property such questions were asked.

An allegation in a bill in equity, that the plaintiff repeatedly asked the defendant for his bill, is met by an admission in the answer that the plaintiff asked the defendant what she should pay him.

A bill in equity to compel the surrender of a lease alleged that the defendant, before anything was said on the subject by the plaintiff, applied to the plaintiff and solicited of her an extension of the building occupied by him, and a renewal of the lease, and then particularly set forth interviews between them, and that the defendant importuned her to renew the lease, and by these repeated applications and protracted importunities the plaintiff was persuaded to renew the lease on the terms desired. *Held*, that these allegations were sufficiently met in the answer by averring that the plaintiff herself, without any inquiry or allusion to the subject on the defendant's part, inquired if the defendant would so extend the building and take the lease; and by admitting the several interviews set forth in the bill, but averring that they were always conducted pleasantly, and that the defendant always allowed the plaintiff time for consideration; and by wholly denying that any of the pretended grievances, deceptions, fraudulent doings, importunities, persuasions and entreaties alleged in the bill were committed or practised by the defendant, and averring these charges were untrue. But that an allegation in the bill that the plaintiff asked the defendant if he thought the rent agreed upon was a fair one, and that he answered affirmatively, was material and should be directly met in the answer.

Bill in equity by the widow and executrix of Samuel T. Armstrong against the firm of Crocker & Brewster, book publishers, to compel them to account for the profits of the publication of the books commonly called "Christian Psalmody,"

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"Select Hymns and Watts entire," and for the profits of certain lands and stocks, and to compel them to surrender to her the lease of a building on Washington Street in Boston alleged to have been fraudulently obtained from her. The opinion exhibits so much of the case as is material to the understanding of the questions of law decided.

G. M. Browne, for the plaintiff.

H. F. Durant, for the defendants.

MERRICK, J. This case comes before the court upon the report of the master to whom were referred the numerous objections taken by the plaintiff to various alleged insufficiencies of the defendants' answer to the bill. He reports that several of those exceptions ought to be sustained. But it is objected that his decisions in reference to each and all of these particulars are erroneous; and the questions now to be considered and determined arise upon the objection.

1. The master is of opinion that the answer is deficient, in not giving the account of sales demanded in the bill, and therefore to this extent that the plaintiff's exceptions should be sustained. And this he affirms upon the general principle that, although a defendant denies the title of the plaintiff and sets up one in himself, he must answer fully, if he answers at all. Story Eq. Pl. § 845 *& seq.* But this case affords no occasion for the application of that principle. The defendants do not deny the title of the plaintiff, and set one up in themselves, to the books called "Christian Psalmody" and "Select Hymns and Watts entire," but deny the publication or sale of these works during any part of the time in respect to which they are called upon to account; and assert the publication and sale of a distinct work, in which they allege that Armstrong had no interest whatever. They do therefore in effect assert that there were no such sales as those of which an account is demanded. And it is a necessary consequence of this allegation, that no such account exists, and therefore that none such can be rendered. This is explicit, and shows that the answer is not obnoxious to the objection made to it.

2. The master reports that so much of the plaintiff's third

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exception as relates to the allegation of her inexperience in business, and of the fiduciary relation of one of the defendants to her, should be sustained, and that the defendants ought in that respect to be required to answer more fully and directly.

The plaintiff's allegation in the bill is that at the time of the decease of her husband she was inexperienced and unskilled in the care and management and in the value of property, and was obliged necessarily to rely on the advice and judgment of some person conversant with business; and that the defendant Crocker, having been in habits of intimacy with her husband and herself, then and afterwards took upon himself the general direction of arrangements in regard to the affairs of the deceased, volunteering his aid, counsel and advice to the plaintiff in all matters of business, and in regard to the ordering and disposition of all her material affairs, and that she had entire confidence in the defendants, and relied upon Crocker especially to advise and aid her in her transactions, and did not buy or sell or lease property without the aid of his judgment.

To the first part of this allegation the defendants' answer that they "can only refer to her own declaration, that her husband was in the habit of communicating to her his business arrangements and transactions;" and they further say that, although the amount of his property was very large, his investments "were such that their value and income, if not fully known by her, could be exactly ascertained by the slightest inquiry; and that until the filing of this bill she never expressed to either of the defendants any doubt of her capacity to take charge, herself alone, of all her property and protect all her interests; nor had they ever any doubt in that behalf."

The answer further alleges that, upon the death of Mr. Armstrong, the defendant Crocker, "having been sent for by the plaintiff, and requested by her to assist her, did offer his services to her freely and fully, as accorded with the intimacy and friendship so long before existing as aforesaid; and at her request undertook the general direction of the funeral arrangements, and also of the arrangements for the settlement of the estate of the deceased in the probate court;" that he collected rents under a

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power of attorney from her; and that she "sometimes conversed with the defendant Crocker about her property and affairs, and not unfrequently asked his friendly advice, which he always cheerfully gave her to the best of his judgment, but not as agent or in any confidential capacity."

In stating the actual relations which subsisted between the plaintiff and the defendants, and the aid and assistance afforded to, and the business transacted for her by them, there does not appear to be any substantial omission in responding to all of the material parts of the bill to which the exception applies. Her alleged inexperience in business, and their alleged fiduciary relation to her, are clearly met and substantially denied; and the answer must in this respect be considered sufficient.

3. The eleventh exception asserts that the defendants do not in terms deny that the plaintiff asked Crocker for her bill as she alleges that she had done; and the master is of opinion that this exception should for this reason be sustained. It seems to be quite immaterial whether she did or did not ask him for his bill; but, whether it was so or not, the statement that she did inquire of him what she should pay him, and that he replied that he should be satisfied with whatever sum she should think fit to give, is a sufficient answer to her allegation upon this subject.

4. In reference to the fourteenth exception, the master is of opinion that the defendants' answer that "the plaintiff asked of other persons besides the said Crocker as to the proper annual rent of buildings and stores in the immediate vicinity of her store," but without stating "of whom, or as to what property, she made such inquiries, nor in regard to the rent of what property," is insufficient. The inquiries however, which were made by her, concerned facts which, if they ever occurred, may justly be presumed to be within her own personal knowledge; and therefore when the defendants referred or alluded to these inquiries, as tending to show that she did not rely exclusively, or at all, upon their representations, it was unnecessary that they should particularly specify either the persons of whom, or the property concerning which, the inquiries were made.

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5. The twenty-fifth, twenty-sixth and twenty-eighth exceptions are all founded upon the assumption that the plaintiff's allegation, that Crocker, one of the defendants' firm, and before anything was said on the subject on her part, applied to her and solicited of her an extension of the store then occupied by them, and of the leases thereof, is not fully and clearly denied in the answer; and for this reason these exceptions should, in the opinion of the master, be sustained. But this seems to be an inaccurate and unwarrantable conclusion. The defendants assert in their answer that the plaintiff, of her own accord, and "without any inquiry or allusion to the subject on their part, did herself inquire of Crocker if they would so extend the store and take the leases." This is in effect a clear and plain denial of her allegation on the subject, and is therefore all that can be required of them.

6. The bill alleges in substance that the lease of the store to the defendants was obtained by them of the plaintiff by means of the protracted, excessive and unreasonable importunities of Crocker; and it proceeds to state, at great length and in very minute detail, the conversation which took place between him and her at their various interviews which preceded and continued up to the time of the execution of the lease. And she excepts to the answer, on the ground that the various charges specifically and distinctly set forth in the bill are not specifically and distinctly denied in the answer. The master reports that the answer is insufficient, and that this, her thirty-ninth, exception ought to be sustained. All that is really material in the various statements and allegations of the plaintiff consists in her averment and charge, that the lease was obtained of her by excessive and persevering importunity. The answer, admitting that the several interviews referred to took place between the parties, avers that they were always conducted pleasantly, and always allowed the plaintiff time for consideration; and then it wholly denies that all or any of the pretended grievances, deceptions, fraudulent doings, importunities, persuasions, entreaties and appeals alleged in the bill were ever done, committed or practised by Crocker, and avers that all the charges thus made

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are wholly untrue. This is full, direct and explicit, and thus meeting and denying in clear terms the only material allegation on this part of the bill, the answer appears to be subject to no valid objection.

7. The twenty-ninth exception, after referring to the averment in the bill that the plaintiff in one of the interviews between them, which preceded the execution of said lease of said store, asked Crocker, in reference to what was a just and reasonable rent for the store, in direct terms, "Do you think that $1500 is a just and fair rent?" asserts that the answer nowhere admits, denies or alludes to this specific charge so directly set forth. The master reports that he is of opinion that this exception is well taken and should be sustained. And in this conclusion we think he is correct. This allegation does not appear to have been anywhere, either in direct terms or in substance, met by the answer. And this being a material allegation, and not denied or replied to, the omission of the defendants fully to reply to it affords just cause of exception.

The conclusion from all these considerations, is that the twenty-ninth exception of the plaintiff to the sufficiency of the defendant's answer is sustained, and that all the other exceptions are overruled. *Order accordingly.*

William Cayzer *vs.* Stephen G. Taylor.

In an action by a servant against his master for injuries sustained from the explosion of a steam boiler used in his business, the plaintiff introduced evidence without objection that there was no such fusible safety plug on the boiler, as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug; and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover; and refused to instruct them that if the defendant used all the appliances for safety, that were ordinarily used in such establishments as his, he was not liable in respect to this boiler, although he did not use the fusible plug. *Held*, that the defendant had no ground of exception.

Ordinary care must be measured by the character and risks and exposures of the business and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases.

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Cayzer v. Taylor.

A master is responsible to his servant for injuries occasioned by the negligence of an incompetent fellow servant, knowingly or negligently employed by the master.

A master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow servant contributes to the accident.

ACTION OF TORT for injuries sustained by scalding from the collapse of a flue in a steam boiler owned and used by the defendant in his manufactory, while the plaintiff was in his employment. The causes of the accident, as alleged in the declaration, were that the defendant negligently managed his engine, and "did not provide a competent and suitable engineer and boiler and engine and pump and gauge and appendages and machinery and precautions for safety used therewith, but carelessly and knowingly provided such as were not competent and suitable and sufficiently safe, and knowingly and carelessly continued the same in use, and improperly used them while out of order and unsafe, either solely or in connection with his servant."

Trial in the superior court of Suffolk at January term 1857, before *Huntington*, J., who after a verdict for the plaintiff allowed the following bill of exceptions:

"Among the particulars which were alleged by the plaintiff against the sufficiency of the boiler, and to sustain which evidence was offered, was, that it was unprovided with a certain fusible safety plug, referred to in the St. of 1852, *c.* 247, and that the defendant used the boiler, knowing it to be so unprovided.

"The defendant, upon this point, offered evidence to show that it was not customary among persons having in use such boilers as the defendant's, and in such establishments as his, to use in connection with them such fusible plugs; and he prayed the court to instruct the jury, that if the defendant's boiler was supplied with all such appurtenances and appliances for safety as such establishments were ordinarily supplied with, he was not liable in respect to his boiler, though in fact he did not have it supplied with the said fusible safety plug in the said statute mentioned. But the court rejected the evidence of a custom violating the requirements of the statute; and instructed the

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jury, that if the plaintiff had satisfied them that the defendant knowingly used his boiler without said plug, placed as the law directs, and that the want of it caused the accident, or essentially contributed to it, and that the injury would not have arisen had it been supplied, this might be used as evidence of negligence, and the plaintiff might have a verdict on this ground; and that it might be considered as part of the implied contract between the plaintiff and the defendant that the latter would comply with the law regulating the use of the boiler, so as to give the former a remedy if he sustained injury from the non-compliance with its enactments; but that if he used the boiler without this knowledge, he could not be charged with negligence on this ground, for he had not violated the law.

"Evidence was also introduced on the part of the defendant, tending to show that the accident would not have happened if the engineer had used ordinary care in the management of the boiler and its appurtenances; and to show that the defendant had in all respects used due care. And the defendant prayed the court to instruct the jury, that if they were satisfied that without negligence on the part of the engineer the accident would not have happened, the defendant was not liable.

"The court instructed the jury thus: The plaintiff must show that he himself was in the exercise of due or ordinary care at the time of the accident. This care must be adapted to the nature of the employment and to the hazards attending the business.

"If the plaintiff and engineer were in the same general employment or business, under one employer, it then becomes important to ascertain the legal relation of the parties. We have in the outset the general principle. A person entering into the service of another, in consideration of his compensation, takes upon himself the ordinary risk of the employment in which he engages; and this risk includes the negligent acts of his fellow workmen in the course of the employment. But a fellow workman's being negligent and unskilful on a particular occasion would not give a right of action. The implied contract between a master and servant is, that the master or principal will use such care as a prudent and careful man in the same

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business, a business similar in its risks, character and extent, would use, both in the selection and employment of an engineer, and in the selection and use of engine, boiler, flues, pumps, pipes, cocks, gauges, valves and all appurtenances belonging thereto. If the defendant employed an unfit and improper person, or used an unfit engine, boiler, flues, gauges, valves and apparatus, or either of them, and such employment or use arose from want of ordinary care in the employer, and by reason of this want of care the injury was incurred, then the defendant would be responsible.

"The meaning of the language 'ordinary care' was then defined, as distinguished from extraordinary care on the one hand, and negligence on the other. The care must be adapted to the nature of the business and employment. The jury will ascertain from the evidence in the case what at that time were the qualifications of an engineer in such an establishment as the defendant's was, and with such engine and apparatus. His qualifications are to be measured by the class of engine and the business done. The care used by the master in the selection of servants and machinery, engine and apparatus, is to be measured by the same standard. This standard would be higher in proportion as life or limb was endangered; and higher where a large amount of property was involved, than a small amount. In other words, the care and prudence must be graduated by the character and risks and exposure of the business.

"It is contended that the defendant was negligent in the selection of an incompetent engineer, and negligent in continuing him in his employment. There are two inquiries here: 1st. Was the engineer competent or incompetent? 2d. If he was not, had the master reason to know it? If he had reason, and if he knowingly, or having good reason to know, and without due care and prudence, employed or continued in his employment such incompetent person, and the accident happened or injury arose by reason of such incompetency, and the plaintiff has satisfied you of this, the burden being on him, he is entitled to recover. If he was not negligent in this respect, or had not reason to know of this incompetency, and the injury did not

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arise from this incompetency, he is not liable on this ground. If it was the careless act of an incompetent engineer, negligently and knowingly employed by the defendant, he would be liable; if it was the careless act of a competent engineer, he would not be liable, so far as this point is concerned.

"It is said the defendant was negligent in suffering his engine, pump, steam gauge, fusible plug, belts and apparatus and appurtenances for safety to get out of order and unsuitable and unsafe. If you are satisfied that he was negligent in this particular, and if the injury arose from this negligence, this would render the defendant responsible. If he was not so negligent, or if the injury did not arise from such cause, the defendant is not responsible.

"It is contended that the defendant was negligent in overloading his engine and boiler and apparatus; in subjecting them to steam power beyond their capacity and line of safety; in fastening down the safety valve and loading the lever with unsafe weights. If the defendant, either by himself or by directions to his servants, carelessly, unskilfully and improperly did any of those acts, and the injury was caused by such negligence or want of skill, he would be liable. If he did not go beyond the line of prudence, skill and care, he would not be liable.

"The jury returned a verdict for the plaintiff, and to the foregoing rulings and instructions the defendant excepts."

C. Browne, for the defendant. The plaintiff counted on the common law liability of the defendant, and not on the St. of 1852, *c.* 247. The question for the jury therefore was, whether the use of the fusible safety plug fell within that due and ordinary care which the defendant was bound at common law to exercise. *Bradley* v. *Boston & Maine Railroad*, 2 Cush. 539. *Linfield* v. *Old Colony Railroad*, 10 Cush. 568. *Shaw* v. *Boston & Worcester Railroad*, 8 Gray, 60. Yet the evidence on this point could not have been objected to as incompetent; because the use of the plug might be shown to be necessary to the exercise of ordinary care, independently of any statute. The refusals and instructions of the judge respecting ordinary care were calculated to mislead the jury upon this question.

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The degree of care required of railroad corporations does not apply to a business not attended with the same extraordinary privileges and extraordinary risks. And it is well settled that in any employment the negligence of a workman is among the ordinary risks which his fellow workmen take. The doctrine indicated in some English cases (*Wigmore* v. *Jay*, 5 Exch. 358; *Wiggett* v. *Fox*, 11 Exch. 832;) that the employer is bound to furnish proper machinery and competent servants, has never been adopted in this country. Nothing has ever been required here beyond ordinary care; and whatever may be the extent of the obligation of the employer to furnish safe and sufficient machinery in the first instance, keeping it in repair afterwards is the duty of the servants, as much as any other part of his business. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 62 *King* v. *Boston & Worcester Railroad*, 9 Cush. 112. *Noyes* v. *Smith*, 28 Verm. 59. There is nothing here to show that the defendant did not have his boiler provided with a better and more suitable plug than the one mentioned in the statute; and if such was the fact, its being casually and partially disordered so as not to be in condition to avert this accident was not enough to prove the defendant guilty of want of ordinary care in his business.

The judge should have instructed the jury that if the accident would not have happened without negligence on the part of the engineer, the defendant would not be responsible. The principle that the servant in hiring himself to the master is presumed to be willing to run all the ordinary risks of business, and among them that of negligence in his fellow servants, should be liberally applied for the protection of employers. If the machinery was such that, with the exercise of due and ordinary care on the part of the engineer, the accident would not have happened, then the negligence of the engineer was the proximate cause of the accident, and the defendant is not liable. *Hayes* v. *Western Railroad*, 3 Cush. 272.

C. G. Thomas, for the plaintiff, cited *Brydon* v. *Stewart*, 2 Macqueen, 30; *Wiggett* v. *Fox*, 11 Exch 832; *Noyes* v. *Smith*, 28 Verm. 59

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THOMAS, J. 1. The defendant excepts to the admission of evidence that his boiler was not provided with the fusible plug prescribed to be used by the *Sts.* of 1850, *c.* 277, and 1852, *c.* 247, and the instructions of the court as to the use of such evidence, when admitted. The obvious, and we think conclusive, answer to this exception is, that the evidence was admitted without objection and without any qualification or limitation, and when thus admitted it was competent evidence upon the question of the defendant's liability, arising under the statute or at common law. The evidence being thus admitted, if the objection had been taken that the declaration was imperfect, an amendment would have been allowed, almost as a matter of course. But the objection was not taken, the exception was not made, and the point is not open.

2. The defendant sought to break the force of the testimony, and offered to show that it was not the custom among persons, using such boilers as his, to have and use such fusible plugs. The court rightly held that a custom not to observe the law could not be shown.

3. The exception to the instructions of the presiding judge as to what was meant by ordinary care cannot be sustained. The instructions were good sense and good law, well expressed. What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers and responsibilities, and then say, What would and should a reasonable and prudent man do in such an exigency? The word "ordinary" has a popular sense, which would greatly relax the rigor of the rule. The law means by "ordinary care" the care reasonable and prudent men use under like circumstances.

4. The next ground of exception, upon which the defendant relies, is the refusal of the presiding judge to instruct the jury that if the accident would not have happened without negligence on the part of the engineer, the defendant was not liable. We think such instruction could not have been given. The de-

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fault of the defendant might have been, not only in having a boiler imperfectly constructed and guarded, but an incompetent and habitually careless and negligent engineer. It is now well settled law, that one entering into the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow workmen in the course of the employment. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49. *King* v. *Boston & Worcester Railroad*, 9 Cush. 112. *Gillshannon* v. *Stony Brook Railroad*, 10 Cush. 228. It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant or use of a defective instrument. If the defendant employed a competent engineer, and used a boiler properly constructed and guarded, he would not be liable for injuries resulting from an act of carelessness or negligence of such engineer. But we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury. The very object and purpose of a safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance — to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it.

The case of *Hayes* v. *Western Railroad*, 3 Cush. 270, relied upon by the defendant, proceeds upon the ground that the injury was caused by the negligence of the workman, his failure to be in his place and discharge his duty, and that the train being short of hands was wholly immaterial. Otherwise, it would be difficult to sustain it. See language of the court, p. 274.

The instructions of the presiding judge upon the liability of

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the master, as affected by the relation of the defendant as fellow servant of the engineer, are not in our judgment liable to just exception. The counsel for the defendant asks of us a liberal application of the principle by which the servant is presumed to assume the risks of the business, and among others the negligence of his fellow servants, for the protection of the master. The principle should not be so extended as to impair in the least degree the obligation resting upon the master, in the prosecution of a business involving unusual risk of health or life or limb, to employ well guarded instruments and competent agents.

*Exceptions overruled.**

ROBERT DUNLAP *vs.* WILLIAM S. BARTLETT.

Danger of the death of an assaulted person in consequence of the assault is no ground for refusing bail on a charge of assault and battery only.

HABEAS CORPUS of one who had been brought before the police court of the City of Boston on a complaint for an assault and battery upon George Walsh, and committed to await his trial in the municipal court, and who had been refused bail on the ground that Walsh's injuries were so serious as to endanger his life.

J. H. Bradley, for the petitioner.

G. W. Cooley, (County Attorney,) for the Commonwealth.

BY THE COURT. This party not being held for a capital offence, nor it appearing that he ever will be, it is a case for bail. The fact that there is danger that the act may result in a homicide is to be considered by the court in fixing the amount of bail. But not having, as yet appears, committed an offence which is not bailable, he is entitled to bail.

Prisoner admitted to bail.

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* See *Bartonshill Coal Co.* v. *Reid*, 3 Macqueen, 266; *Bartonshill Coal Co.* v. *McGuire*, 3 Macqueen, 300; *Holmes* v. *Clarke*, 6 H. & N. 349; *Searle* v *Lindsay*, 11 C. B. N. S. 429; *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466; *Ryan* v. *Fowler*, 24 N. Y. 410; *Buzzell* v. *Laconia Manuf. Co.* 48 Maine, 113.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET,
MARCH TERM 1858, AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, }
HON. THERON METCALF, } JUSTICES.
HON. GEORGE T. BIGELOW, }
HON. BENJAMIN F. THOMAS, }

OWEN G. PEABODY *vs.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE.

If a trustee having power to sell, but not to mortgage, mortgages the trust estate, the remedy of any one claiming, either in his own right or as trustee, under the *cestui que trust* is at law and not in equity.

BILL IN EQUITY, alleging that by indenture between Jane B. Glover, William H. Montague and John B. Glover, the said Jane, in anticipation of her marriage with said William, conveyed to said John certain real estate, in trust, among other things, that he "shall and may bargain, sell and convey, assign and dispose of all and singular the above granted premises, from time to time, whenever they the said William H. and Jane shall by joint writing under their hands and seals so direct, and the

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proceeds of such sale or sales invest in such other manner, in personal securities or in real estate, to the same uses and upon the same trusts herein declared of and concerning the above granted premises;" that said Jane and William shortly after intermarried, and John assumed the office of trustee, and at their direction by joint writing under their hands and seals, executed and delivered mortgages of this real estate to the defendants; that those mortgages were unauthorized and void; and that Jane afterwards, under a power of appointment reserved in the marriage settlement, devised said real estate to the plaintiff, to hold in trust for her children, and died. The bill prayed for a decree, instructing the plaintiff in the performance of his duties as trustee, and declaring how and to what extent the mortgages created a lien upon the property, and for further relief.

Answer, that the mortgages were within the power given to the trustee in the clause above set forth, and were made in the execution of the trust in good faith for valuable consideration, and vested a good title in the defendants as against the plaintiffs; and that the plaintiff was not entitled to relief in equity, but had a plain, adequate and complete remedy at law.

This case was argued at November term 1857.

O. G. Peabody, pro se.

E. Merwin, for the defendants.

DEWEY, J.* In the opinion of the court the questions discussed in this case would more properly arise in an action at law. If the views of the plaintiff are sound as to the rights of the respective parties, the plaintiff has a plain, adequate and complete remedy at law, as is alleged in the answer. The estate claimed by the plaintiff is a legal estate, properly the subject of a writ of entry, and this is only the ordinary case of a controverted title to real estate.

The fact that the plaintiff holds the estate as trustee does not change the proper jurisdiction as between him and a third party, claiming by an adverse title inconsistent with and independent of that of the plaintiff. We think the bill should be dismissed

* SHAW, C. J. did not sit in this case.

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without prejudice, leaving the plaintiff to pursue his remedy by an action at law, if he elects so to do.

Bill dismissed, without prejudice.

HENRY W. FULLER *vs.* CONRAD RUBY.

In an action to recover rent, the plaintiff counted on a lease to the defendant, an assignment thereof from the lessor to the plaintiff, notified to the defendant, and the defendant's consequent liability to him for use and occupation; and introduced evidence, without objection, that the defendant assented to such assignment, and afterwards attorned and paid rent to him. *Held*, after verdict for the plaintiff, that the defendant could not object to the variance between the declaration and the proof.

A bill of exceptions cannot be sustained unless it states enough of the evidence to show that the judge ruled erroneously and to the prejudice of the party excepting.

Whether the eviction of a tenant by his landlord from part of the demised premises suspends the entire rent, *quære*.

Interruption by a landlord of his tenant's occupation, without evicting him, does not suspend the rent, either in whole or in part.

ACTION OF CONTRACT to recover rent. The declaration alleged that the defendant as lessee made an indenture with Louis N. Tower as lessor, and thereupon entered upon the premises, and had ever since occupied the same; that Tower assigned the indenture to the plaintiff in writing; and that the defendant now owed the plaintiff the sum of $87.50, "pursuant to said indenture, for the use and occupation of the tenement therein for the six months severally preceding" the 1st of January 1856, "together with interest on the monthly rents so in arrears; said Ruby well knowing of such assignment." Copies of said indenture and assignment were annexed to the declaration.

At the trial in the superior court of Suffolk the following facts were proved: In November 1854 the plaintiff, being seised in fee of the premises, demised them, together with two adjoining tenements, for ten years to Tower, who entered, and in December 1854 underlet the premises by said indenture to the defendant for the monthly rent of $14.58. The defendant entered, and continued in possession till February 1856, excepting so far as disturbed or evicted as stated below. On the 1st

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of June 1855 Tower assigned to the plaintiff, by instrument under seal, his lease to the defendant, and also all his interest in the lease from the plaintiff, subject to said lease to the defendant. The defendant knew of this assignment and assented to it, continued in possession, attorned to the plaintiff, and on the 1st of July 1855 paid him the amount of one month's rent, but had paid none since, although the plaintiff had demanded rent of him monthly.

The defendant contended that if there was a tortious eviction of the defendant by the plaintiff from part of the premises described in the lease declared upon, the entire rent was suspended. The statement in the bill of exceptions of the facts on this point was thus: "There was evidence tending to show that the roof of a shed on the premises had been used for years previously by the tenants for drying clothes, access to which was by stairs and a scuttle door, and that the plaintiff some time in July 1855 told the defendant that he had no right to pass up there for that purpose; that the door was nailed up or locked up, and so continued; and that the defendant told the plaintiff he would pay no more rent, because he cut off that privilege."

Huntington, J. instructed the jury that if the defendant, knowing of the assignment to the plaintiff, paid rent to him under the lease and assignment, admitted that he was the plaintiff's tenant, and continued in possession under the lease, and the plaintiff accepted rent of him as his tenant and treated him as such, it was competent evidence from which the jury might infer that the defendant waived the claim that the rent was merged, and which might rebut the presumption of law as to a merger; and that if the right to use the roof existed previously to July 1855 under the lease, and the plaintiff interrupted that use by stopping it, the defendant continuing in the beneficial occupation of the rest of the estate, it would not, as a rule of law, suspend all claim for rent, but the jury might deduct such sum from the rent reserved by the lease as they thought reasonable. The jury returned a verdict for $67.00, and the defendant alleged exceptions.

This case was argued at November term 1857.

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E. M. Bigelow, for the defendant.

J. A. Loring, for the plaintiff.

METCALF, J. These exceptions do not show that the defendant has any legal reason to complain of the conduct or result of the trial before the jury.

1. It is not necessary to decide whether the ruling as to the alleged merger was correct; because there is a ground on which it is plain that the defendant is answerable to the plaintiff for use and occupation, if not for rent in its technical sense. The declaration is upon an indenture and an assignment thereof to the plaintiff, averring notice to the defendant of that assignment, and alleging, as a legal inference, that the defendant owes the plaintiff a certain sum for use and occupation of the house demised in the indenture. It is immaterial whether this declaration would have been held good or bad on demurrer. For on the trial evidence was given, without objection from the defendant, that he assented to the assignment of the indenture, attorned to the plaintiff, and afterwards paid a month's rent to him, according to the stipulation contained in the indenture. This proved an agreement, beyond the mere legal effect of the indenture and assignment — if they had any legal effect on the defendant — on which the defendant would have been held liable to the plaintiff on a general count for use and occupation. *Gibson* v. *Kirk*, 1 Ad. & El. N. R. 850. Even in an action of debt for rent reserved in a sealed lease, it never was necessary to declare on the lease. This was an exception to the rule of pleading which required a deed to be declared on, when an action was founded on it. *Warren* v. *Consett*, 2 Ld Raym. 1503. *Atty* v. *Parish*, 1 New Rep. 109. *Davis* v. *Shoemaker*, 1 Rawle, 140. If the defendant's oral agreement to pay rent to the plaintiff, after the assignment of the indenture, was inadmissible under the plaintiff's declaration, it should have been objected to at the trial. The plaintiff might then have had leave to amend. After a trial on the merits, in which a good cause of action for the matter of the suit is proved, and a verdict returned for the plaintiff, the defendant cannot be permitted to object, for the first time, that the action was not in

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the right form, or that the declaration was not supported by the evidence. *Jones* v. *Fales*, 4 Mass. 254. *Brown* v. *Waterman*, 10 Cush. 117. Were it necessary to the saving of the plaintiff's rights, the court might now permit an amendment of his declaration. Rev. Sts. *c.* 100, § 22. *Cleaves* v. *Lord*, 3 Gray, 66. *Stone* v. *White*, 8 Gray, 589.

2. The other matter of exception is the refusal or omission of the judge to rule that an eviction of the defendant, by the plaintiff, from a part of the demised premises, suspended the entire rent. But the evidence, as stated in the bill of exceptions, showed no eviction of the defendant by the plaintiff; and we can add nothing to it, by presumption or otherwise. A bill of exceptions must set forth so much of the evidence as shows that the judge erred in his ruling as to the law applicable to that evidence; and not only that the judge erred, but that the error was prejudicial to the party who takes the exceptions. There can be no pretence that what the plaintiff told the defendant, or what the defendant told the plaintiff, was any evidence of eviction from the roof of the house. If there had been evidence that the plaintiff nailed or locked up the scuttle, or ordered it to be done, and kept it permanently so nailed or locked up, such act of his might have been admissible evidence, to be submitted to the jury, in proof of eviction. But the exceptions do not state that the plaintiff nailed or locked up the scuttle or ordered it to be done. It "was nailed up or locked up, and so continued." By whom? How long? If by the plaintiff, and permanently, it should have been so stated. The evidence set forth in the exceptions did not raise the question whether an eviction of the defendant by the plaintiff from a part of the demised premises suspended the entire rent or any part thereof; because it showed no such eviction. That question was therefore an abstract one, upon which a judge cannot be rightly called on to make a ruling or give instructions.

It is probable that more evidence was given, tending to prove an eviction of the defendant from the roof of the house, than the exceptions show. For the judge did not treat the question as an abstract one, but made a ruling as on a question properly

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before him. And in consequence of that ruling, the jury deducted more than twenty dollars from the plaintiff's claim, when, upon the exceptions, there was no legal reason why he should not have had a verdict for the full stipulated rent. As this was not to the prejudice of the defendant, but for his advantage, he cannot take exception to it.

We avoid the expression of an opinion, whether eviction of a tenant by the landlord from part of the demised premises, suspends the entire rent; because that question is not rightly before us. That such eviction has that effect, by the law of England, we have no doubt. Such is the decided preponderance of authority. *How* v. *Broom*, Gouldsb. 125. *Upton* v. *Townend & Greenlees*, 17 C. B. 30, 64. *Christopher* v. *Austin*, 1 Kernan, 216. In 1814, it was held by Chief Justice Dallas, at *nisi prius*, that the whole rent was not suspended, in such a case, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on a *quantum meruit*. *Stokes* v. *Cooper*, 3 Campb. 514, note. And this was stated as the law in the treatises, afterwards published, on the law of landlord and tenant, by Claydon, Comyn, Archbold, Smythe and Taylor; in 2 Roscoe on Real Actions, 410; Crabb on Real Property, § 205, and in numerous other books. And the king's bench in Ireland, in the case of *Grand Canal Co.* v. *Fitzsimons*, 1 Hudson & Brooke, 449, distinctly adjudged this point in the same way, on the authority of *Stokes* v *Cooper*. But Mr. Baron Parke, in *Reeve* v. *Bird*, 1 Cr., M. & R. 36, and 4 Tyrwh. 614, questioned the decision of Chief Justice Dallas, and the recent case above cited from 17 C. B. shows that it is not the law of England. We are not apprised of any decision on this point in this commonwealth; though there is a *dictum* of Jackson, J. in *Fitchburg Cotton Manuf. Co.* v. *Melven*, 15 Mass. 271, that "it is a discharge only in proportion to the value of the land evicted;" and the question was left open in *Shumway* v. *Collins*, 6 Gray, 227.*

* In *Leishman* v. *White*, 1 Allen, 489, it was held, that a tenant evicted by his landlord from part of the demised premises was no longer liable, either for rent or for use and occupation.

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If the point had been decided here conformably to the case of *Stokes* v. *Cooper*, and the question had been rightly before the judge at the trial, we could not have sustained his ruling, if the plaintiff had excepted to it, because it was so phrased as to authorize a deduction of rent if the plaintiff interrupted the defendant in the use of the roof of the house by stopping it. An interruption of a tenant, by the landlord, is not necessarily an eviction of him. And nothing less than an eviction will suspend rent, either in whole or in part. On this ruling the jury may have found their verdict on a mere trespass, or temporary disturbance of the defendant, by the plaintiff, for which the remedy was by action, and not by withholding pay for the use and occupation which was enjoyed. 1 Saund. 204, note 2. Com. Land. & Ten. 197. 5 Dane Ab. 310. *Bennet* v. *Bittle*, 4 Rawle, 339. *Ogilvie* v. *Hull*, 5 Hill, 52.

Exceptions overruled.

THOMAS L. MIZNER *vs.* GEORGE MUNROE.

Notice to a tenant at will that his landlord has made a lease of the premises to another person need not state that such lease is in writing.

The authority of an attorney by whom a notice to a tenant at will that his landlord has leased the premises to another is signed need not be known to the tenant.

ACTION on the Rev. Sts. *c.* 104, commenced on the 12th of July 1855, for possession of a dwelling-house in Boston.

At the trial in the superior court of Suffolk at May term 1856, it appeared that Norton Newcomb, the owner of this house, executed and delivered a written lease of it to the plaintiff, dated June 30th 1855, for one year; that the defendant was then tenant at will of the same, paying rent quarterly; and that the following notices, which were both written upon one piece of paper, were duly served on the defendant on the day of their date.

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"Boston, June 30, 1855. Mr. George Munroe, Dear Sir, This is to inform you that I have this day leased the premises now occupied by you, number nine Garden Court Street, in Boston, to Thomas L. Mizner. You will please conduct yourself accordingly. Norton Newcomb,

"by his attorney, M. Dyer, Jr."

"Mr. George Munroe, Dear Sir, You are hereby notified to quit and deliver up to me, within five days, the premises now occupied by you, number nine Garden Court Street, in Boston. You being tenant at sufferance, no further notice will be given. I am particularly desirous of obtaining the peaceable and quiet possession of the premises, if possible; otherwise, I must have recourse to legal measures; the premises having been leased by the owner, Norton Newcomb, to me. Boston, June 30, 1855. Yrs truly, Thomas L. Mizner,

"by his attorney, M. Dyer, Jr."

It was admitted that Newcomb and Mizner authorized Dyer to give these notices, as the attorney of each, and to sign their names thereto. But there was no evidence that the defendant ever knew or recognized Dyer as their attorney, except from these notices and his conduct at the time of serving them, or had any other notice or information of the written lease, or of a determination of his tenancy. But it was in evidence that at the service of the notices on him, which was done personally, he made no objection to the agency of Dyer, expressed no doubt thereof, nor required any proof or information as to the authority of Dyer to give the notices, and that he then had opportunity so to do.

On this evidence the defendant moved that the plaintiff be nonsuited. But *Nash*, J. refused the motion, and instructed the jury that the notices were sufficient information to the defendant of the determination of his tenancy; and that if the defendant did not object to the form of signature at the time the notices were served on him, and did not question nor require further information or proof of the authority of Dyer, the notices were legal and sufficient. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

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G. H. Kingsbury, for the defendant, cited *Furlong* v. *Leary*, 8 Cush. 409; Paley on Agency (3d Amer. ed.) 345; *Right* v. *Cuthell*, 5 East, 498; *The Queen* v. *Justices of Worcester*, Will., Woll. & Hodges, 152; *Doe* v. *Goldwin*, 2 Ad. & El. N. R. 143; *The Queen* v. *Justices of Surrey*, 5 Ad. & El. N. R. 511.

M. Dyer, Jr., for the plaintiff.

METCALF, J. The written lease for a year, given by Newcomb to the plaintiff, terminated the defendant's tenancy at will, and gave the plaintiff a right to institute and maintain this action, after the defendant had received due notice of that lease. *Furlong* v. *Leary*, 8 Cush. 409. And we think due notice thereof was received by the defendant. Twelve days before this action was commenced, Newcomb gave him written notice that he had made a lease to the plaintiff, and the plaintiff, at the same time, gave him a like notice. This was more than the law required. A notice from the plaintiff alone would have been sufficient; and that notice need not have been in writing.

The first objection made to the notices which were given to the defendant is, that they did not state that the lease to the plaintiff was in writing. But, as the defendant received notice of a lease, and was thereupon requested to conduct himself accordingly, and quit the house in five days, he must have known that such a lease was meant as had terminated his tenancy at will, made him tenant at sufferance, and authorized the lessee to require him immediately to quit; and that none but a written lease would have this effect. The notices were not of themselves proof of the fact that a lease had been given to the plaintiff, and would not have been proof that it was in writing, if they had so stated. The facts stated in a notice, if not admitted, must be proved in court; and in the present case, the fact was proved that a lease of the house for a year, and in writing, was given by Newcomb, the owner, to the plaintiff. We think the defendant had sufficient notice of the lease, and that he disregarded that notice at his peril.

The other objection made to these notices is, that the defendant did not thereby know that they were signed by the authorized attorney of Newcomb and the plaintiff. But we think the

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defendant might as well object to the notices on the ground that he did not know that they were not forgeries. The genuineness of the notices, and the authority of the attorney who signed them, were matters to be proved at the trial, if not admitted. *Reade* v. *Kennedy*, 12 Irish Law R. 565. And the attorney's authority was admitted at the trial.

The decisions cited for the defendant, on this point of the authority of an attorney who signed a notice in the name of his constituent, are not applicable to this case. They all relate, either to some special provision of an English statute, or to notices given to tenants to quit. But the present defendant, being a tenant at sufferance after the lease was made to the plaintiff, was not entitled to notice to quit, but only to notice that his tenancy at will was terminated; and the only question is, whether he had sufficient notice of that fact. We are of opinion that he had. *Exceptions overruled.*

MARTHA TWYCROSS *vs.* FITCHBURG RAILROAD COMPANY.

A lessee's covenant "to pay all taxes or duties levied or to be levied" on the premises during the term does not bind him to repay the expenses of paving the sidewalk in front of the premises, required of the lessor by the town under authority of a statute.

ACTION OF CONTRACT to recover the expense of paving the sidewalk in front of land in Charlestown, leased by the plaintiff in 1844 for fifteen years to the defendants, who covenanted in the lease "to pay all taxes and duties levied or to be levied thereon during the said term." In October 1854, the city of Charlestown caused the sidewalk in front of the premises to be paved, pursuant to St. 1824, c. 16, the plaintiff having neglected to do so; and the plaintiff paid the expense thereof, and brought this action to recover it, which was submitted to the decision of the court upon the above facts.

H. D. Austin, for the plaintiff, cited *Torrey* v. *Wallis*, 3 Cush. 442; *In re Mayor &c. of New York*, 11 Johns. 77; *Bleecker* v

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Ballou, 3 Wend. 263; *Mayor &c. of New York* v. *Cashman*, 10 Johns. 93; *Post* v. *Kearney*, 2 Comst. 394; 1 Story on Const. U. S. § 952.

M. G. Cobb, for the defendants, cited *Goddard, petitioner*, 16 Pick. 504; *Torrey* v. *Wallis*, 3 Cush. 442; Declaration of Rights, art. 23; Const. Mass. *c.* 1, § 1, art. 4; Rev. Sts. *cc.* 7, 8; *Kearney* v. *Post*, 1 Sandf. 105, and 2 Comst. 394; *Bolling* v. *Stokes*, 2 Leigh, 178; *Lefevre* v. *Detroit*, 2 Mich. 586; *Southall* v. *Leadbetter*, 3 T. R. 458.

THOMAS, J. The question in this case is, whether the amount paid by the plaintiff and lessor to the city of Charlestown for paving the sidewalk in front of the premises demised is included in "the taxes and duties levied or to be levied," which the defendants, the lessees, stipulated to pay.

This sidewalk was paved by the city under the provisions of the St. of 1824, *c.* 16, entitled "an act to regulate the sidewalks in the town of Charlestown." The provisions of this statute throw much light upon the question to be decided. The first section prescribes the mode in which, in all paved streets in Charlestown, the sidewalks shall be constructed. The second section provides that whenever the town shall direct the paving of any public street, every owner of a lot adjoining shall without delay, at his or her own expense, cause the sidewalk in front of his or her land to be paved with brick or flat stone, and supported by hammered edge stone, and kept in repair, under the direction and to the acceptance of the surveyors of highways; and if the owner shall neglect or refuse to pave and support the sidewalk, after the owner or the tenant of the lot or the attorney of the owner shall have been required to do so, the surveyors are required to pave and support or to repair the same, and may recover the expense by an action on the case in their name. There are further provisions that when the selectmen shall be of opinion that the owner of the lot is unable to comply with the requisitions, the selectmen may direct the sidewalk to be made at the expense of the town; and when there are any vacant lots, the surveyors may at their discretion allow the owner to cover the sidewalk with plank and support it with

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timber, to be replaced by stone and brick whenever the surveyors shall think it necessary. No lien is created upon the land for the expense of such paving.

These provisions all look to the owner of the land, and to him only. He is the person to construct and to keep in repair. He, under the direction of the surveyors, is to determine of which material, wood or brick or stone, the walk is to be constructed. If the owner is unable, the town is to construct the walk. If he is able, of him the expense is to be collected. The improvement is a permanent one, and the duty of the owner to construct and to repair is permanent. There is no provision for the construction of the sidewalk when the owner is unknown, and for collecting the expense by a lien upon and sale of the land.

In the light of these provisions, and without seeking to determine what possible burdens upon the estate may be included under the terms "taxes and duties," we think it quite clear that the expense of constructing the sidewalk was not a tax or duty levied or to be levied upon the premises demised.

It is true this statute was in existence when this lease was made. But it is also true that in looking at its provisions the tenant might see that they would not affect him, because the statute caused no tax or duty to be levied upon the estate.

The expense of paving the sidewalk is not only not within the letter of the contract, but not within the reason and equity of it. It is a permanent improvement of the estate, the benefit of which is to be found in the increased value of the estate and in the increased rent which it would permanently command.

Plaintiff nonsuit.

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David Austin *vs.* Theodore S. Harris & another.

If a lease contains a covenant not to underlet or permit any other person to occupy without the lessor's assent, and that any breach of the lessee's covenants shall terminate his estate therein; an agreement of the lessee to assign the demised premises for the residue of the term is not complied with by an assignment duly executed by him, but not assented to by his lessor.

Action of contract to recover the amount agreed to be paid for an assignment of a lease from Samuel Sheafe to the plaintiff. Answer, that the plaintiff did not obtain his lessor's assent in writing to the assignment, although the defendant requested him to do so, and offered to pay him said amount if he would. The facts are stated in the opinion.

H. C. Hutchins, for the plaintiff.

J. W. Rollins, for the defendants.

Thomas, J. This is, we think, a plain case. The plaintiff, for the consideration which he seeks to recover in this action, was to assign to the defendants, on the 1st of February 1856, the lease of the store numbered 219 on Washington Street, and to give up and surrender to the defendants on that day "all that part of the said building occupied by him the said Austin and demised to him by said lease, for the remainder of the term of said lease, to wit, until the first day of March 1856." Here is clearly, if not more, an agreement to give to the defendants the legal possession of the store, and to permit them to use and occupy the premises demised from the 1st of February to the 1st of March.

In the lease under which the plaintiff held the premises he covenanted, among other things, "that he would not lease, nor underlet, nor permit any other person or persons to occupy the same, except with the approbation in writing of the lessor or those having his estate in the premises." It is one of the express conditions of the lease, and the term granted is subject to the condition, that "if any of the covenants to be observed on the part of the lessee or those holding under him shall be broken, the lessor or those having his estate in the premises, whilst such

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neglect or default continues, may without further notice or demand enter upon the premises, or any part thereof in the name of the whole, and repossess the same as of his former estate, and thereby absolutely determine the estate of the lessee therein." The plaintiff had no approbation, written or oral, to assign he lease or to permit the defendants to occupy the premises.

The assignment tendered to the defendants would have transferred to them no use of the premises for the remainder of the term. If it operated even as a permission to the defendants to occupy, it would for that very reason have operated as a determination of the lessor's estate. The defendants had the right to a legal surrender of the premises for the remainder of the term, and not merely to a transfer formal but valueless.

Judgment for the defendant.

PEOPLE'S MUTUAL INSURANCE COMPANY *vs.* OTIS ALLEN & another.

The record of losses kept by a mutual insurance company is sufficient *prima facie* evidence that such losses have occurred, in an action to recover an assessment laid upon the members.

An assessment by a mutual insurance company is valid that is based upon a computation of the losses from month to month, and includes in the losses chargeable upon each policy all those of the entire month in which it expires, excluding those of the month in which it began.

A premium note, payable in such portions and "at such times as the directors may agreeably to their by-laws require," to a mutual insurance company, whose by-laws provide that the deposit note shall be double the premium, and "that on all policies for less than a year the deposit note may be for such a sum as the president may determine;" and which has issued such policies, with a deposit note of one dollar and a premium paid of a larger sum; is not invalidated by a slight disproportion, occasioned by laying an assessment on the deposit notes only, instead of the amount of the premiums and deposit notes.

An assessment by a mutual insurance company is not invalid because it is made to cover losses occasioned by bad investments; nor because it is laid in place of a previous illegal assessment which the directors have not enforced; nor because in consequence thereof it has been delayed for some months.

ACTION OF CONTRACT by a mutual insurance company upon a premium note, made on the 1st of January 1852, in con-

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sideration of a policy that day issued by the plaintiffs to the defendants for one year, and by which the defendants promised to pay to the plaintiffs "the sum of two hundred dollars, with interest, in such portions and at such times as the directors may agreeably to their by-laws require," to recover an assessment laid on the 13th of September 1854.

The case was referred to an auditor, and submitted to the decision of the court upon his report in favor of the plaintiffs, as upon an agreed statement of facts.

The plaintiffs' secretary produced before the auditor the "loss book" of the corporation, containing the date of issuing each policy, the amount insured, the date of the loss, and the amount allowed by the directors, when adjusted; and testified that this was the only record of losses kept by the plaintiffs. The defendants objected to its admission, and contended that the plaintiffs must prove that the losses had actually occurred. But the auditor admitted it as *prima facie* evidence of the losses therein recorded.

The other objections argued by the defendant and the material facts are stated in the opinion.

I. W. Beard & J. Nickerson, for the plaintiffs.

B. Dean, for the defendants.

Dewey, J. 1. The ruling of the auditor as to the competency of the evidence offered to prove that losses by fire had occurred was correct.

2. It furnished no valid objection to the legality of the assessment, that it was based upon a computation of losses from month to month, without regard to the fact that policies expired at various times during each month; nor that the company adopted as the general rule of computing losses chargeable on a policy, to take the months in which the policy terminated, and exclude that in which it commenced; that is, upon a policy commencing at noon January 1st 1852, and expiring at noon January 1st 1853, the company might exclude the losses of January 1852, and include those of January 1853. As one or the other of these months must be necessarily excluded in computing the entire monthly losses, a general rule applicable

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to all such cases was not objectionable, though it might exclude some losses for which the party should in strictness be chargeable, and include some for which he would not in strictness be chargeable; such being the necessary result of a computation of entire monthly losses.

3. The objection that the assessment was not made upon the amount of premiums and deposit notes, but on the basis of the deposit notes exclusively, is one of more doubt. Assessments made under the Rev. Sts. *c.* 37, § 31, are required to be made upon the basis of both premiums and deposits.

The answer to this objection must be found in the fact stated by the auditor, that the difference in the result of the two modes of computation "would be a comparatively unimportant diminution of the assessment on the large notes," and in the by-laws regulating the small class of policies for a time less than a year. It is obvious that as to all other policies, the deposit note being double the premium, the result must be precisely the same, whether assessments were based upon deposit notes or deposits and premiums, if it were uniformly applied to all cases. The only cases in which any practical difference results are those of a small number of policies issued under the provisions of the sixth article of the by-laws, providing that "on all policies for less than a year the deposit note may be for such a sum as the president may determine." Under this provision, certain policies were issued, the assured giving his deposit note for one dollar, while the premium paid was a larger sum. The precise reason for this mode of adjusting the amount of deposit notes, as compared with the premium paid, does not appear. These policies are understood to have been for short periods, and to have required a greater cash premium to be paid, which was directly applicable to the uses of the company, than the ordinary policies of the company. This note by its terms was to be paid "in such portions and at such times as the directors may agreeably to their by-laws require." It was competent for the party giving the deposit note to subject himself to a liability greater than that imposed by the revised statutes. It might be entirely reasonable that a party, who had paid as a

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cash premium for a short risk a sum much larger than the average rate of premium, should be exonerated from giving a deposit note in double the amount of premium paid, or that such premium should be the basis of an assessment.

The fourteenth article of the by-laws authorizes the president and directors to "assess on each member, in case losses should require it, a sum in addition, not exceeding the amount paid by him as premium and deposit note, and collect the same without delay." This is a different provision from that of the Rev. Sts. c. 37, § 31, as to the amount of the liability to be assessed, and also as to the provision of that section, requiring the assessment to be made "upon the members in proportion to the amount of their premiums and deposits severally for seven years."

Upon the facts existing in the present case, the court are of opinion that this assessment is not rendered invalid by reason of the manner of its being ordered by the directors to be assessed, making the notes of the assured the basis, and deducting from the amount so assessed against any policy the cash deposited to the credit thereof.

4. It is no ground for any objection to the assessment, that the company had made a loan of $2000, without adequate security from the borrower, whereby the same was lost. The assessment was in fact ordered by the directors for the payment of expenses and losses for which the company were liable. They might be in the greater necessity for money by reason of losses by bad investments of their cash funds, but this should not deprive them of the power to make the necessary calls upon their members to discharge their liabilities and expenses.

5. Nor does it invalidate this assessment, that there had been a previous assessment laid by the directors to meet some of these losses and a small number of the members had paid that assessment; the directors having subsequently become satisfied that such assessment was illegally laid, and having provided, in the new assessment, that those who had paid the previous one should be credited with it on the new assessment.

6. The delay in making this assessment was not, under the circumstances shown in the case, such as to defeat it, if it

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embraced no losses accruing after the month of January 1853. We are aware that such assessments under the provisions of the revised statutes, and for the benefit of those who seek payment for losses under their policies, are required to be made forthwith, or upon failure so to do a liability may attach to the directors personally. But this has not been considered as affecting the assessment, if not literally complied with. It would seem somewhat remarkable if it were otherwise held, and it might thus be the means of defeating the very purpose for which the deposit notes are required to be taken. Such delay may properly arise from various causes. That which would most frequently occur would be a case of controverted liability for a loss by fire. It might be a subject of protracted litigation, when of course no assessment would be made until the liability was fixed. It might be, as in the present case, that the delay as to the assessment for the earlier losses embraced in the arrears assessed arose from the fact that an earlier assessment had failed to be effectual by some irregularity in making it, not known to be such at the time it was made. In the opinion of the court, the delay in the present case does not vitiate the assessment. *Marblehead Insurance Company* v. *Underwood*, 3 Gray, 213.

7. As to the various other points suggested in the brief of the defendants, but not argued, we perceive none that can avail the defendants.

Giving full effect to the finding of the auditor as to matters properly passed upon by him, in the opinion of the court

Judgment should be rendered for the plaintiffs.

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Lica Parker & another *vs.* Bridgeport Insurance Company.

In a policy of insurance upon a saw-mill, the assured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered "A good watch kept; men usually at work. Watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?" In fact no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to and habitually did examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. *Held*, that the term "good watch" must be interpreted to mean "suitable" or "proper watch"; and that it was for the jury to decide whether the watch kept was a suitable and proper one, and whether the risk was affected by the watch actually kept, as compared with the one stipulated for.

Action of contract on a policy of insurance upon machinery and stock in a saw-mill at Winchester, in which the insured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to them and material to the risk; and that if any material fact or circumstances shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void."

The application contained printed interrogatories and answers written opposite them, which stated that the mill was driven by water power only, and among which were the following:

"2. What kind of goods are made and of what material? Are wood-shavings made on the premises? and if so, are they cleared out of the building every night?"	"Mahogany sawing and knobs turned. Very few shavings made. Cleared out every night."

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"16. Is a watch kept upon the premises during the night? Is there a good watch clock? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning, till he returns to his charge in the evening?"	"A good watch kept. Men usually at work. "Watchmen work at the saws." "No."

At the trial in the superior court of Suffolk at November term 1856, it was in evidence that "there was no watch ever kept in the mill on Saturday night after twelve o'clock, or on Sunday night at all, after the date of the application to the time of the fire, other than the workmen sleeping there, who worked at the saws, and who were instructed to examine, and were in the habit of examining, the mill with reference to fires before going to bed; that the fire by which the property insured was destroyed occurred on Sunday evening about ten o'clock, and that when the fire occurred neither of the persons who usually slept in the building was upon the premises, but they were in a dwelling-house near by."

Abbott, J. ruled "that it was the duty of the plaintiffs to have a person in the mill, whose employment it was to keep a good watch in the building, during the whole of Saturday and Sunday nights, although in addition to the duty of watching, he might be employed about other work; and the keeping such workmen to sleep there, though with a view to greater security than would exist if there was no one there, was not a good watch or substantial performance of said duty; that a failure to substantially perform said duty would bar a recovery; and that evidence of the usage in other like mills not to keep such a watch on Sunday nights and on Saturday nights after twelve o'clock was not admissible to affect the case in this respect;" and also ruled, "*pro forma*, in order to carry up the point, that it was the duty of the plaintiffs to keep some person upon the

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premises during the whole of the daytime of Sunday, and that a customary absence of all persons during the hours of divine service, would be a breach of duty which would bar a recovery." A verdict was taken for the defendants, and the plaintiffs alleged exceptions.

C. P. Judd, for the plaintiffs, cited *Crocker* v. *Peoples' Mutual Fire Ins. Co.* 8 Cush. 79; *Jones Manuf. Co.* v. *Manufacturers' Mutual Fire Ins. Co.* 8 Cush. 84; *Underhill* v. *Agawam Mutual Fire Ins. Co.* 6 Cush. 440; *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114; *New York Firemen Ins. Co.* v. *Walden*, 12 Johns. 513; *Ruggles* v. *General Interest Ins. Co.* 4 Mason, 81; *Curry* v. *Commonwealth Ins. Co.* 10 Pick. 540; *Dorr* v. *Fenno*, 12 Pick. 529; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 82; *Percival* v. *Maine Ins. Co.* 33 Maine, 249.

B. Sanford, for the defendants, cited *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114; *Glendale Woollen Co.* v. *Protection Ins. Co.* 21 Conn. 19; *Sheldon* v. *Hartford Fire Ins. Co.* 22 Conn. 235.

Shaw, C. J. Although the condition or defeasance upon which the defendants rely is put into the form of an express stipulation on the part of the assured, inserted in the policy, and declaring that, in case of a misrepresentation in a matter known to the assured and material to the risk, it shall be void; this is little, if anything, more than the law itself would declare, in case of such false representation proved.

The alleged false representation is contained in the answer to the sixteenth question in the application. It is difficult to determine what is meant by the first part of that answer. One inquiry is not answered at all — that respecting the watch-clock. The inquiry was, "Is a watch kept upon the premises during the night?" The answer certainly fell short of answering affirmatively to the whole question, that is, that a watchman is kept there during the whole night, or during every night. And it does not aver that any watchman is engaged, distinct from workmen. There being nothing but the term "good" applied, "a good watch," our opinion is, that it is equivalent to "suitable," "proper," adapted to the exigency of the

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case. The inquiry is not as to watchman, or watchmen; the more generic term "watch" embracing the various modes of watching such a factory. It was a factory the machinery of which was driven by water; no steam was used; it was not a manufactory of metals, or one that required the use of fire.

Upon an examination of the bill of exceptions, it appears to us, that there were several points ruled positively as matter of law, which should have been left to the jury; and this on several grounds.

In the first place, if there was not an absolute stipulation that a watch should be kept during the whole of every night in the week, such a watch as would be necessary and proper to the safety of such an establishment against fire, then it was a question of fact whether the watch actually kept was or not a good and suitable watch. *Crocker* v. *Peoples' Mutual Fire Ins. Co.* 8 Cush. 79.

If there is a real difference between the requirement of a watch, immediately after a working day, and Sunday, which is a day of rest, then a watch might be deemed good and adequate on Sunday night, which might not be after a working day. The causes of danger of fire in a factory, we suppose, are lamps and stoves, after work is done; friction, arising from the great velocity and irregular action of working machinery; spontaneous combustion; incendiaries; and lightning. The last, of course, no watch would affect; the three first, perhaps the greatest, would be likely to disclose themselves within a few hours after the close of work, and therefore would seem to exist in a less degree on Sunday night. If there was ground to except Saturday night, when the workmen, charged as watchmen, examined the premises after the close of business, having an interest in the safety of a building in which they slept; or if there was ground to except Sunday night, after a day in which no work had been done; then it was incorrect to charge the jury, that it was the duty of the assured to have a person to keep a good watch in the building during the whole of Saturday and Sunday nights, otherwise they could not recover.

But suppose the sixteenth question and answer, by their proper

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construction, could be held to be a representation that the plaintiffs had been accustomed to keep, and would in future keep, a watch on the premises every night during the week, including Sunday and Saturday, still the stipulation that this was a just and true exposition is not absolute, but only *sub modo;* the contract is, that is, so far as they are known to the assured, and are material to risk. The question therefore is, not only whether the assured was substantially to comply with his stipulation that the representation is true and just, but whether such compliance was material to the risk. This is a question of fact, to be decided by the evidence.

The insurer may prescribe any conditions to his undertaking, that he pleases, and if he makes insurance on condition that a constant watch shall be kept on the premises, otherwise the policy shall cease and be void, then if the assured fails to comply with the conditions, his policy is to cease, and no question can be made whether compliance affected the risk in any way. But when such condition is qualified by the limitation, that it is a failure dependent on the question whether it is material to the risk, it opens that question in each particular case.

Exceptions sustained.

Mary R. Hammond *vs.* American Mutual Life Insurance Company.

Under a policy of life insurance, to "terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable," if the day of payment falls on Sunday, the premium is not payable until Monday, even if the assured dies on Sunday afternoon.

Action of contract upon a policy of insurance, insuring the life of John Hammond, in consideration of a premium "to be paid annually in advance, during the term of this policy, or half or quarter yearly in advance, with interest on each portion deferred;" and payable to the plaintiff "within ninety days after

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proof of the death of the said John Hammond, provided this policy is then in force." The policy upon its face declared that "in case the premium charged hereon shall not be paid annually in advance, or half or quarter yearly in advance, on or before the day, at noon, on which the same shall become due and payable," it should "cease and terminate, and neither the whole nor any part of the sum herein agreed to be paid shall be due or payable;" and that the policy was "granted and accepted in reference to all the conditions herein contained," and others annexed. The "conditions of insurance" annexed to the policy, provided that "policies are null and void during the nonpayment of any premium due; but the company will, at their discretion, receive a payment after due, and continue the policy, if satisfied that the party remains in perfect health."

Upon the back of the policy were these words: "Premiums payable 1st January; or 1st January and 1st July; or 1st January, 1st April, 1st July and 1st October, at noon."

The parties submitted the case to the decision of the court upon the policy and the following facts: John Hammond paid the premiums quarter yearly, as provided by the policy, and was taken sick on the 24th of September, and afterwards confined to his house, but not thought to be past recovery until the morning of Sunday, October 1st 1854, and on that day, between the hours of two and four in the afternoon, died, without having paid the premium for the quarter which began on that day. The defendants' office was not open on Sunday, and no one was there to receive the premium, but this was not known to the plaintiff, and no attempt was made to pay it until Monday, October 2d, in the forenoon, when it was tendered and refused. The death of the assured was notified by the plaintiff to the defendants on the 18th of December 1854.

L. Mason, for the plaintiff, cited *Stebbins* v. *Leowolf*, 3 Cush. 137; *Thayer* v. *Felt*, 4 Pick. 356; *Avery* v. *Stewart*, 2 Conn. 69; *Sands* v. *Lyon*, 18 Conn. 18; *Delamater* v. *Miller*, 1 Cow. 75; *Salter* v. *Burt*, 20 Wend. 205; *Link* v. *Clemmens*, 7 Blackf. 479; *Barrett* v. *Allen*, 10 Ohio, 426; 1 Kent Com. (6th ed.) 131; Rev. Sts. *c.* 50, § 1; *Buckbee* v. *United States Insurance, Annuity*

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& Trust Co. 18 Barb. 541; *Hammond* v. *American Mutual Life Ins. Co.* 20 Law Reporter, 273.

H. A. Scudder, for the defendants. This policy may be regarded as an insurance from quarter to quarter, so long as the premium thereon was paid "quarteryearly in advance," and therefore as having expired on the 1st of October 1854 at noon, before the death of the assured. *Tarlton* v. *Staniforth*, 5 T. R. 695. *Want* v. *Blunt*, 12 East, 188. *Mutual Benefit Life Ins Co.* v. *Ruse*, 8 Georgia, 534.

If not, then it must be construed as a conditional agreement of the defendants to pay the sum named "within ninety days after proof of the death of the" assured, "provided this policy is then in force." And

(1.) The conditions of the policy had not been complied with on the part of the assured at the time of his death. The premium was not paid or tendered "in advance," or "on or before the day at noon on which it became due," or "during the term of the policy," that is, the life of the assured; and the assured died after the premium "became due," and "during the non-payment" thereof. Consequently the policy was not then "in force," but had become by its own terms "null and void." Cases above cited. *Vose* v. *Eagle Life Ins. Co.* 6 Cush. 42. *Hathaway* v. *Trenton Mutual Life Ins. Co.* 11 Cush. 448.

(2.) The tender subsequently made on Monday cannot operate *nunc pro tunc* as a compliance with the conditions of the policy. If available at all, it must be upon the ground that when the day of performance of contracts falls on Sunday, compliance with the stipulations of the contract on the next day is deemed in law a performance. *Salter* v. *Burt*, 20 Wend. 205. But that rule only applies to one class of contracts, and even there seems of questionable authority. *Avery* v. *Stewart*, 2 Conn. 69. *Kilgour* v. *Miles*, 6 Gill & Johns. 268.

No such rule can apply to this case. The assured being dead, there was no person in existence legally authorized to tender a compliance with the requirements of such a rule, and no contract of the assured to which such rule could be applied. The assured never contracted to pay the successive premiums.

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Compliance with the terms of the policy in this respect was entirely optional on his part. The act to be performed by him was in the nature of a condition precedent, and as such must be strictly construed, and the defendants' liability made to depend upon previous compliance with that condition.

No necessity existed for an application of the rule, as the premium might have been paid before as well as on the day it became due. And to allow its application would be to enable the assured, by his own negligence, to cast upon the defendants the burden and risk of insuring his life for an additional day without any adequate consideration; inasmuch as the payment of the premium at the expiration of such additional day would be left to depend upon the will, or at least upon the ability, of the assured, in violation of the express terms and conditions of the policy.

DEWEY, J. There can be no doubt as to the character of this contract, and that the policy would be forfeited and avoided by the neglect of the assured to pay the premium chargeable thereon at any quarter day when the same became due and payable. The policy was granted by the one party and accepted by the other with a recital therein that the same was to be taken "in reference to all the conditions herein contained." Among those conditions it is provided that "in case the premium charged hereon shall not be paid annually in advance, or half or quarter yearly in advance, on or before the day, at noon, on which the same shall become due and payable," then the same shall "cease and terminate, and neither the whole nor any part of the sum agreed to be paid shall be due or payable."

The whole inquiry is reduced to this point, when was the quarter yearly payment for the quarter succeeding that commencing on the 1st of July 1854 due, and by law required to be paid? Adopting the proper division of the year into four quarters, and commencing on the 1st of April 1854, the third quarter would commence on the 1st of October, and the premium to be paid for that quarter, irrespectively of the circumstance that the first day of October occurred on Sunday, would be required to be paid on that day. The assured had however until the 1st of

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October at noon to pay the premium. He was not in default before that time, unless it be that in case the 1st of October occurring on Sunday, he was required to pay the premium on the Saturday preceding. The only question in the case seems to be whether Sunday is to be excluded as a day of payment, and the payment properly postponed till Monday, or whether the party, to save his policy from being forfeited, must make his quarterly payment on or before Saturday, when the quarter day falls on Sunday.

We have on the one hand the rule as to commercial paper, or negotiable notes payable with grace, requiring payment to be made on Saturday where the third day of grace falls on Sunday; and on the other a rule, generally adopted as to other contracts to pay money or perform other specific duties on a certain day named, that if such day falls on Sunday the day of performance is postponed till Monday. *Salter* v. *Burt*, 20 Wend. 205.

In reference to notes payable on a certain day, but entitled to three days' grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and therefore if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from than to add to a period of time thus originally allowed as mere grace and favor. But as to other contracts, which by the face of the instrument required a payment on a day which proves to be Sunday, to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The party paying and the party receiving money on that day in discharge of a contract would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October in each and every year during the life of the party assured. The defendants had no office open

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on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured, in not paying the premium fully due on the 1st of October, as should be held to terminate the policy.

It is urged on the part of the defendants that this was not an ordinary contract to be performed on a day certain, and that the assured was under no legal obligation to pay subsequent premiums after the expiration of a quarter of a year; but such payment was a voluntary act, to be done or not done at his election; and therefore that the rule of law applied to a contract binding a party to do some act at some future named period, which proved to be Sunday, has no proper application here. But we think the rule as to the time of making the payment is the same in both cases. It was the purpose of the assured to obtain a policy to continue during his life. Such policy was issued to him, but upon condition that he should make his quarter yearly payments regularly in advance. It was obligatory on him to pay, if he would continue the policy in force. The day of payment was on this occasion the first day of October. That day, as it appears, fell on Sunday; and this being so, he was entitled to the ordinary privilege of discharging his obligation on the Monday following. The quarter yearly payment, it is true, in terms became payable on Sunday noon; but that day was not a day for secular business, and therefore, legally speaking, Sunday was not the day "at which the same became payable;" and so, by the very provisions of the policy, properly construed, the quarterly premium was seasonably tendered on Monday. *Judgment for the plaintiff.*

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Jeremy Perkins *vs.* Augusta Insurance and Banking Company.

A vessel was insured "at and from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port (European) between Tarragona and Gibraltar, and at and thence to New York." Four months after, this memorandum was indorsed on the policy: "Permission is given to stop at one other port between Tarragona and Gibraltar, paying one fourth additional premium if liberty is used." *Held*, that this gave permission to stop between Tarragona and Gibraltar upon the homeward voyage from Tarragona, but not to stop at Gibraltar also.

A policy of insurance on a vessel is not avoided by her going out of her course to obtain necessary medical assistance for the captain's wife; and the question of the necessity is for the jury.

Taking on board water and additional cargo, at a port into which a vessel has gone to obtain necessary medical assistance, does not avoid a policy of insurance on the vessel, unless it increases the delay or the risk.

A letter of abandonment of a vessel upon the ground that, in consequence of sea perils, "being found irreparable on survey, she was condemned and sold," sufficiently states the cause of abandonment, if the vessel was so much damaged that the costs of repair would exceed half her value, deducting one third new for old.

The certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that time, if supported by his oath that he examined the vessel, and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts.

A question "whether, if the foremast was sprung, the try-sail split and standing rigging such as to need replacing at" a certain port, "the master would probably have known it?" does not depend on nautical skill, and cannot be put to an expert.

Action of contract on a policy of insurance, dated April 9th 1851, upon the Brig Josephine, "at and from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port (European) between Tarragona and Gibraltar, and at and thence to New York." On the 18th of August 1851 this memorandum was indorsed on the policy: "Permission is given to stop at one other port between Tarragona and Gibraltar, paying one fourth additional premium if liberty is used." Answer, deviation and unseaworthiness. Trial at November term 1854 before *Bigelow*, J., who made the following report thereof:

"It appeared that the vessel left Tarragona on her return voyage on the 22d of July 1851, with a part of her cargo on board; on the 28th of July put into Almeria and took in a considerable quantity of cargo, remaining there till August 11th; and on the 16th of August was abreast of the port of Gibraltar.

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"The captain testified that his wife, who was on board with the knowledge and consent of the owners, came upon deck to look at the Rock, and on turning to go down the cabin stairs missed her footing, and fell from the top to the bottom, a distance of about six feet; that she was at that time in the third month of her pregnancy; that under the circumstances he felt himself called upon to stop at Gibraltar for medical advice and aid; that he accordingly came to anchor and sent a boat on shore for a physician; that the physician prescribed for her, and under his advice and direction the vessel remained at Gibraltar until August 22d; that while there some new cargo was taken on board; that the vessel left Gibraltar as soon as his wife was well enough; and that the logbook was kept by the mate, and he believed it to be correct."

The entries in the logbook from August 16th to August 22d made no mention of the accident to the captain's wife, but corresponded with his testimony in other respects.

"On her voyage home, the vessel met with a disaster and was abandoned to the underwriters.

"These facts presenting a question of law as to whether the policy was made void by an unjustifiable deviation, the jury were directed by the presiding judge to find a verdict for the defendants, which is to stand confirmed or be set aside, and a new trial ordered, as the judgment of the whole court may be upon the above point of law."

This question was argued and decided at November term 1855.

G. S. Hillard, for the plaintiff.

R. Choate & J. M. Bell, for the defendants. 1. The policy either calls for a straight voyage from Tarragona to Boston, touching nowhere, looking to the use of the two ports, to touch at which permission is given, between Tarragona and Gibraltar on the outward voyage; or, if the permission to use the two ports allows their use on the return voyage, it calls for a straight voyage from the last port visited in accordance with the permission to Boston. Neither of these constructions gives liberty to touch at Gibraltar.

2. The sickness of the captain's wife was no excuse for the

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deviation at Gibraltar. Sickness of the crew even, unless so great as to leave the ship with too small a force to work her, is no excuse. 1 Arnould on Ins. § 152. *Woolf* v. *Claggett*, 3 Esp. R. 257. The captain's wife had no right, as against the defendants, to be there; and in this respect the vessel was, as it were, not properly fit for the voyage; and going out of the course to procure aid for her was like putting into port for medicine and medical aid which ought to have been on board, or on account of sickness of crew, when the vessel was insufficiently manned in the first instance. The case does not find that her life was in danger; and even the deviations to save life, which have been excused, have been to pick up men from other vessels. 1 Arnould on Ins. § 152. 1 Phil. Ins. § 1027. The log-book shows that the ship did not put into Gibraltar for the sickness of the captain's wife, but to take in water and wait for cargo.

Merrick, J. The brig having stopped on her passage back from Tarragona to the United States, first at Almeria and afterwards at Gibraltar, the defendants insist that there was a deviation in each of these instances by which the underwriters were discharged from all responsibility on account of subsequent losses. This is denied on the other hand by the plaintiff, who contends that the privilege of entering and using each of those ports on the homeward voyage was secured to him, first by a clause relating to that subject contained in the policy, and again by the terms of the memorandum indorsed upon it on the 18th of August. But neither of these conflicting propositions is fully warranted as a consequence of any express stipulation or agreement between the parties. The insurance of the brig by the defendants was upon a voyage, as it is described in the policy, "from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port between Tarragona and Gibraltar, and at and thence to New York." But by a later arrangement between the parties the further permission was given to the insured "to stop at one other port between Tarragona and Gibraltar." Considering the manner in which that permission is expressed, and the time when it was given, it was obviously the concession of a privilege to be availed of on

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the homeward voyage. This is indicated by the order in which the two places constituting the external limits of the space within which it was to be enjoyed are mentioned, and is a reasonable implication from that circumstance. And as Tarragona, which is the extreme point and termination of the outward voyage, is first named, and is therefore to be passed before this right can be exercised, it is a necessary consequence that it must be exercised on the passage of the brig to its homeward port. And that this was the intention of the parties is apparent from a consideration of the time when their agreement was made. The memorandum was indorsed on the policy more than four months after its date, when they could have entertained no reasonable doubt that the whole outward voyage had been accomplished, and that the brig was either then lying at Tarragona, or had already departed thence on her passage back to New York. It is to this part of the voyage therefore that the permission in the memorandum indorsed on the policy is, according to the intention of the parties, to be applied; and it gave the assured the right, of which he availed himself, to put into the port of Almeria. But he had no such right to stop as he afterwards did at Gibraltar. It was not included in the liberty secured to him in the description of the voyage in the policy, nor in the additional privileges which were conceded to him by the indorsement of the memorandum upon it. That place is mentioned in the former clause as one of the points to be touched at, and then to be departed from for Tarragona; and in the latter, as one of the external limits or boundaries of the space within which the liberty of using another port may be availed of. Neither of them recognizes it as a port to be revisited, or to which the brig, after once having left it, might again resort.

But the plaintiff contends that, independently of the rights of the parties, as they are fixed and established under and by virtue of the particular provisions contained in the policy and the memorandum indorsed upon it, the accident which befell the wife of the captain, and the necessity of resorting, in consequence of it, to medical advice and assistance for her relief, constituted a sufficient and legal justification for the putting

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in and detention of the brig at the port of Gibraltar. The broad and comprehensive proposition that delay or going out of the course for the purpose of succoring the distressed is said by Mr. Phillips to have been invariably held to be no deviation. And he adds, that if this principle, though always mentioned by elementary writers as an admitted and established doctrine of maritime law, is not often recognized by the courts, it is because a justification resulting so directly from the plainest principles of humanity, and in the sufficiency of which the assured and insurers are usually so much interested, has never been directly called in question. 1 Phil. Ins. § 1027.

It is true that the authorities to which he refers in support and illustration of this general proposition are cases where the object of the departure from the course was to carry relief to mariners or passengers destitute and suffering on board other vessels. But the principle is not confined to such cases. It has a wider and more general application. Its validity was recognized by the court in the case of *Kettell* v. *Wiggin*, 13 Mass. 68. There the vessel insured went out of her course from the Isle of May to St. Jago and Fuego and back to the Isle of May; and it was contended that this voyage was necessary and constituted no deviation, because there was a scarcity of provisions and water, and the crew might otherwise have suffered from a want of them. And Chief Justice Parker, in delivering the opinion of the court, said, that if the destitution was not occasioned by the negligence of the master, the excuse was sufficient and justified the departure from the course. It makes no difference whether the object of such departure is to alleviate the distress and administer to the necessities of persons who are lawfully on board, or of strangers suffering from disasters sustained by the loss or wreck of another vessel. The dictates of humanity are as forcible in the one case as in the other; and it would be strange and unreasonable if the law recognized any discrimination between them.

To make the excuse valid and effectual, it must without doubt be shown that there was a real necessity for the departure of the vessel from her proper course. The exigency which demands

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relief must be equal in importance to the intervention which is required in its behalf. Whether it exists, and what it is, must always be questions of fact. To determine rightly all the circumstances of infirmity and suffering and of relief afforded on the one hand, must be considered in connection with the increased length of the voyage, the prolonged time required to accomplish it, and the additional risk incurred, on the other. Mr. Arnould lays down the rule, that only actual force and constraint, either moral or physical, will constitute a justification. But from the explanation which he afterwards adds, it appears that the requisite kind and degree of force may considered as being applied, where the state of circumstances is such, that the master, exercising a sound judgment, and acting for the best interests of all concerned, has no alternative left, as a prudent and reasonable man, but to take his vessel out of its course. 1 Arnould on Ins. § 152. The rule, thus qualified, neither excludes a consideration of the claims of humanity, nor fails to afford a reasonable degree of protection to the pecuniary interest of parties who have insured the safety of the ship. But if there is a conflict between the two, the former must, to the extent above stated, be regarded as of paramount importance.

The testimony of the captain upon the trial of the present action tended, we do not think it necessary now to express any opinion how strongly, to show the existence of an exigency which justified the departure of the vessel under his charge from the regular and onward course of the voyage, and its detention for the time it was delayed in the port of Gibraltar. But the presiding judge, considering that the facts disclosed in that testimony presented a question of law, which should be determined by the court before further progress was made in the cause, the fact whether such exigency existed was not tried nor submitted to the jury. In the view which we have taken of the whole subject presented in the report, we are of opinion that the former verdict which was taken for the defendants should be set aside and the case placed in order for trial. The question of fact whether there was a deviation will then be submitted to the determination of a jury, under proper instructions from the

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court, conforming to the principles which have been already stated and explained. And if it shall then be made to appear that the brig was taken into the port of Gibraltar and detained there solely for the purpose of affording succor to the distressed upon a fit and proper occasion, the defence relied on cannot be maintained.

It was testified by the captain, and it is also reported in the logbook, that while the brig was lying in the port of Gibraltar certain bales of merchandise were taken on board as part of her cargo. And the defendants insist that the mere fact of taking cargo on board while she was lying in a port when there was no previous agreement or stipulation that the vessel should go in or remain for that purpose, did of itself necessarily constitute a deviation. But this position is untenable. If a ship, under the terms of a policy, or for any sufficient legal cause, is justified in originally entering into the port, her subsequent trading, by breaking bulk, loading or unloading, during the period of her lawful stay and detention there, although such trading, loading and unloading are foreign to the main purpose of the adventure, and not specifically provided for by the terms of the policy, will not be held to amount to a deviation. 1 Arnould on Ins. §§ 143 *& seq.* *Lapham* v. *Atlas Ins. Co.* 24 Pick. 1. *Chase* v. *Eagle Ins. Co.* 5 Pick. 51. But it would be otherwise if those operations caused additional delay, or otherwise substantially enhanced or varied the risk. Of these matters the jury will judge upon the evidence submitted to them.

New trial granted.

At the second trial at March term 1856, before the chief justice, the defendants waived all objection to the plaintiff's recovery on the ground of deviation; and it appeared that the vessel, after leaving Gibraltar to proceed on her voyage to the United States, and when about four days out, encountered a gale of wind, upon the character and force of which, its action upon the sea, and the combined action of the wind and sea on the vessel, much conflicting evidence was given; and that, the vessel leaking so badly that many of the officers and crew considered it

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unsafe to proceed, the captain concluded to put back, intending to return to Gibraltar; but after two days, the wind proving unfavorable to go to Gibraltar, put away for Cadiz, and reached that port, having been out from Gibraltar about eight days; that at Cadiz surveyors appointed by the American consul, at the request of the master, estimated the necessary repairs at over $6000, and expressed an opinion that the cost of a complete repair there would amount to more than the vessel would be worth when repaired; whereupon the master sold the vessel and appurtenances.

After the arrival of intelligence that the vessel had put into Cadiz in distress, the plaintiff signed and addressed to the defendants the following letter:

"Boston, November 5th 1851. Messrs. Page & Banks, Agents Augusta Insurance and Banking Co. Gentlemen, I am sorry to learn by the public prints that the brig Josephine has been compelled to put into Cadiz in distress, in consequence of sea peril encountered on her passage from the Mediterranean for New York; and that, being found irreparable on survey, she was condemned and sold. In consequence of this information I am compelled to abandon said vessel to your company, so far as she was covered by policy No. . And I now give you notice of a claim for a total loss. Whenever the documents come to hand, I shall submit them to you."

1. The chief justice, as he stated in his report of the trial, "instructed the jury, as above stated, not that the plaintiff would recover for a total loss without an abandonment, in consequence of the sale, but that if the vessel had suffered so much damage by a peril insured against, that the costs of repair would exceed half her value, deducting one third new for old, this was a constructive total loss, which, if followed seasonably by a valid abandonment, would warrant them in finding for a total loss. It was not objected that the abandonment was not seasonable, but that it did not sufficiently and truly state the cause. The letter of abandonment was produced; and supposing that the construction of it was matter of law, the chief justice was of opinion that the words 'found irreparable

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therein, did not mean physically incapable of being repaired at any cost; but incapable of being repaired, without expense after deducting one third, which would exceed one half of her value, as specified in the valuation; and if that was the case, it was sufficiently stated in the letter, to make it a valid abandonment."

2. The plaintiff, in order to prove the seaworthiness of the vessel when she sailed from New York, offered the deposition taken at New York in 1854, and the certificate annexed to one of the answers, of Samuel Candler, who testified as follows:

"I am a marine surveyor, and have been so since the year 1843. I was a shipmaster about forty years, and commanded a great many vessels, before I was appointed surveyor by the chamber of commerce and board of underwriters in this city. The business of a marine surveyor is to survey hatches and stowage of cargoes, and to appraise, arbitrate and judge of vessels and goods arriving damaged or becoming damaged in the port of New York. Besides my business as surveyor, I have been for ten or eleven years inspector of vessels for Lloyds, London. My duty as inspector is to inspect vessels for the purpose of giving them their rate and character. I have no doubt that on an average I have inspected three vessels every working day during the last ten years. In inspecting a vessel for rating, we ascertain where she was built, how old is she, what timber she is built of, and her condition generally in hull, rigging and spars. This is inspection for rating. In inspection for repairs, we direct our attention to the particular damage to the vessel said to require repairs, and not so much to the other parts of the vessel.

"I examined a brig named Josephine. I do not remember when. I should think two or three years ago. I do not remember the name of the captain. She was lying in the port of New York. I do not remember at whose request or to what extent.

"I have examined the paper annexed to the commission.*

* United States of America. Port of New York.
The undersigned, Samuel Candler, marine surveyor, and inspector for the un-

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The writing of that paper is in my handwriting, and the signature is mine. The statements therein contained were true at the date thereof, so far as I know or remember.

"A 2 means 'second rate' here and at Lloyd's. It means a vessel that has deteriorated from a higher rate by wear, or a vessel that is not perfectly constructed either as respects style or materials, or that has been crooked or strained or worked so as not to be perfectly tight. An A 2 vessel is considered just as safe, and will insure in this city, and I believe at Lloyd's, as low as an A 1 vessel, but she is not so valuable.

"I do not remember whether I saw the Josephine out of water or unladen; and I do not know of any means of refreshing my memory except from the certificate annexed to the commission That certificate is taken from the surveyor's books, and they would not contain any more particulars, unless the vessel was under repair, when they would state in addition what repairs had been needed and what were made.

"I do not remember the fact of the examination at all. In the usual course of my business I cannot rate a vessel without examining her sufficiently to judge of her seaworthiness. But in this case I have no recollection of the fact."

The chief justice "was of opinion that the certificate of the inspector, issued in the course of his business, and verified by his oath, was competent evidence."

3. Captain Alden Gifford, called by the defendants, testified that he was formerly a shipmaster, and now a marine surveyor and inspector of vessels in Boston. This question was put

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derwriters at Lloyd's, does hereby certify and make known unto all to whom these presents shall come or may concern, that at the request of the parties interested, I have taken a strict and careful survey of the brig Josephine, Rogers master, of 232$\frac{4}{5}$ tons measurement, built of the best materials at Scituate, Massachusetts, in 1833, copperfastened and coppered, tight, strong and substantial, calculated to wear well, a good easy model, fit to carry dry and perishable cargoes; rates A 2, and is worthy of full confidence.

In testimony whereof I have hereunto subscribed my name this 2d day of April in the year of our Lord one thousand eight hundred and fifty one.

Samuel Candler.

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to him: "Whether if the foremast was sprung, the trysail split, and standing rigging such as to need replacing at Gibraltar, the master would probably have known it?" It was objected to, as a question not depending on nautical skill. Thereupon the chief justice ruled that it was a question not apparently depending on nautical skill of the witness, and not admissible.

The jury returned a verdict for the plaintiff for a total loss, and the defendants excepted to the rulings above stated.

These exceptions were argued at November term 1857.

Choate & Bell, for the defendants. 1. The abandonment was insufficient. The cause stated in the letter was that the vessel was irreparable; this was not true in fact; for she could have been repaired, though at a cost which would have exceeded half her value, deducting one third new for old. 2 Arnould on Ins. §§ 366, 379, 385, 403. 2 Phil. Ins. §§ 1681, 1684. *Peirce* v. *Ocean Ins. Co.* 18 Pick. 93. *Dickey* v. *New York Ins. Co.* 4 Cow. 222. Upon the plaintiff's construction, if she could be repaired at a trifle over that arbitrary amount, she would be irreparable in America, reparable in England.

The construction of this letter, being a mercantile instrument, was for the jury. *Carpenter* v. *Providence Washington Ins. Co.* 16 Pet. 495. *Etting* v. *Bank of United States*, 11 Wheat. 76. 2 Parsons on Con. 5.

2. The certificate of Candler was improperly admitted. The general rule is, that the least degree of evidence admissible is the recollection of the witness upon his oath. This paper does not come within any of the established exceptions. It is not introduced to prove a single act, such as the execution of a deed, or the posting of a notice, or the protest of a note; but is an extended and detailed narrative. Nor is it like a book of account, kept in the ordinary course of business, open to many eyes, and full of numerous particulars. The limit of proving matters done in the ordinary course of business is to show that there was no neglect of official duty. There was no necessity for the examination of the ship; if there had been, it could easily have been remembered. Even entries in a log book are not evidence, unless the person who kept it will swear that on

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his present recollection he believes them to be true; and in fact he does in every case remember some facts. But this witness does not even remember that he was ever in the ship. Nor does he swear that he made the certificate at the time of the examination. No paper is admissible which is not the first which was made. 1 Greenl. Ev. § 437. *Merrill* v. *Ithaca & Owego Railroad*, 16 Wend. 596. *Doe* v. *Perkins*, 3 T. R. 749. *Alvord* v. *Collin*, 20 Pick. 430, 431. *Bunker* v. *Shed*, 8 Met. 152, 153. *Chamberlain* v. *Carter*, 19 Pick. 188.

3. The question put to Gifford concerned what would be visible to an eye sharpened by experience, and required nautical skill to answer.

Hillard, for the plaintiff.

Bigelow, J. 1. The abandonment was sufficient. It gave notice to the insurers, that the cause of the loss was a sea peril, encountered on the passage of the vessel from one port to another, by which she was rendered irreparable. It would be giving too strict a construction to a document, to the validity of which no precise form or technical words are necessary, to hold that the word "irreparable" signified that the vessel was absolutely incapable of receiving repairs. Construed, as it ought to be, with reference to the mutual rights and liabilities of the parties under a contract of insurance, the more reasonable and natural inference from the language was, that the vessel had sustained damage by a peril insured against to an amount sufficient to absolve the insured from the necessity and duty of making repairs upon her, and to justify a claim for a total loss. If she was injured so that the cost of repairs, after deducting one third new for old, would exceed half her value as stated in the policy, it was not incumbent on the plaintiff to repair her. In this sense, she was irreparable by him, because such repairs would be inconsistent with his claim against the defendants for a total loss.

2. The certificate made by the marine inspector at New York as to the condition and seaworthiness of the vessel in the year 1851 was competent evidence. It was not a mere private memorandum, made for the purpose of enabling a witness to refresh

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his memory, and recall and testify to the facts therein stated But it was a certificate made by a person of skill and experience, engaged in the regular and constant performance of a particular duty or service, well known and recognized among merchants and shipowners, and sanctioned by the usage and customs of business.

Nor was it the record of a past transaction merely, or of existing facts casually noticed, to which no importance was attached at the time. On the contrary, it was a statement of facts contemporaneous with the written memorandum, made for the purpose of giving information to parties interested in the subject matter to which it related, and which was acted on by them. It was therefore in its nature a semi-official document, and although not made in pursuance of any positive enactment or rule of law, it was nevertheless, like the entries made by bank clerks, messengers and other similar agents, competent evidence of the fact therein stated. It seems to us to come within the rule laid down and fully illustrated and explained in *Shove* v. *Wiley*, 18 Pick. 558.

Nor can it be fairly said that the certificate is not supported by the oath of the witness. Although he has no independent and distinct recollection of the facts therein stated, yet in connection with the certificate, and the usual course of his business, he does testify to the truth of the statement. *Smith* v. *Johns*, 3 Gray, 517. *Crittenden* v. *Rogers*, 8 Gray, 452.

3. The question put to the expert was inadmissible, because it asked that which did not require any special skill or experience to answer. No person competent to sit on a jury would need to be told whether a master of a vessel would "probably know that his foremast was sprung, his trysail split, and his standing rigging in such condition as to need replacing."

Judgment on the verdict.

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LYMAN KINSLEY *vs.* LEWIS RICE & others.

The holder of a policy of insurance, made by a stock company when under liability for losses to an amount equal to their capital stock, cannot maintain an action on the Rev. Sts. c. 37, § 18, against the directors for a loss under his policy, without first recovering a judgment against the company, fixing the amount of the loss.

THOMAS, J. This action seeks to charge the defendants as directors of the Metropolitan Insurance Company for a loss by fire under a policy of insurance issued by that company. It seeks to charge them by force of the provisions of the Rev. Sts. c. 37, § 18. That section provides that if "any of the said companies [stock companies] shall be under liability for losses to an amount equal to their capital stock, and the president or directors, after knowing the same, shall make any new or further insurance, the estates of all who shall make such insurance or assent thereto shall be jointly and severally liable for the amount of any loss which shall take place under such insurance." The declaration contains a count in tort and one in contract, both setting forth facts which (assumed to be true, as they must be in this hearing) would render the defendants liable.

To both counts the defendants have demurred, and on two grounds; first, that the declaration does not allege that the plaintiff has established his claim against the insurance company by a suit and judgment at law or otherwise; and secondly, that the defendants are not liable under the statute to a personal action at law.

The question raised by the demurrer is not as to the ultimate liability of the defendants, but whether the suit can be maintained in this form. We think it cannot; that the loss as against the company must be ascertained and determined before the plaintiff can proceed against the defendants as directors making the insurance; that it is upon and for a loss ascertained and determined that the defendants are to be charged, if at all.

Though the words of the statute would seem, at first view, to warrant an action at law against the defendants, as the par-

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ties originally liable under the contract for the loss, the difficulties attending such construction are insuperable. Such has been the conclusion of this court in the interpretation of other statutes creating like liabilities of the officers or stockholders of corporations. *Harris* v. *First Parish in Dorchester*, 23 Pick. 112. *Knowlton* v. *Ackley*, 8 Cush. 93. *Merchants' Bank* v. *Stevenson*, *ante*, 235, and cases cited.

1. The determination of the loss must necessarily precede the question of the liability of the defendants as directors for such loss. The first is a question between the insured and the company. The contract of insurance is with the corporation. The corporation is the party primarily liable. It is the party by whom the question of loss must be tried. A judgment in this suit would not conclude the company, which is not a party to the record, and has no day in court. On the other hand, no one of the defendants nor all could contest the liability of the company as against its own default or admission. *Holyoke Bank* v. *Goodman Paper Manuf. Co.* 9 Cush. 576.

2. If the question whether there was a loss or not within the policy could be settled in a suit against the directors, so far as the defendants in the suit were concerned, and so as to charge them, then, as the liability of the president and directors is several as well as joint, the question of the loss might have to be tried as many times as there were president and directors whom the plaintiff might seek to charge. The results of the different suits as to the loss under the policy might conflict; in one case for the insured, in another for the underwriters; and if in all cases for the insured, the estimates of the loss by different juries might widely differ.

3. The result of a construction of the statutes, by which the question of the loss should be tried in the suits against the directors or any of them, would be to defeat and deprive any director sued and charged of the benefits of those provisions of the statutes, which give him a remedy for contribution against any other director or directors for his or their due proportion by bill in equity or action at law against the corporation for the money paid by him; for neither the corporation nor the other

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directors could be concluded by judgment as to the loss, in a suit to which they were not parties and in which they had no power to intervene. Rev. Sts. c. 37, § 35.

The regular course of procedure is for the insured to ascertain and fix the amount of his loss by judgment against the company; and then, if there are any of the directors who are liable for the judgment under the provisions of the statutes, a bill in equity or action of contract may be brought against such directors or any of them, setting forth the claim against the corporation and the grounds on which the insured expects to charge the defendants personally. Rev. Sts. c. 37, § 34.

For the purposes of this case, it is sufficient to say this action cannot be maintained, because it does not appear that the plaintiff has established his claim for loss against the company.

Demurrer sustained.

E. Merwin, for the defendants.

C T. Russell, for the plaintiff.

Charles Wills *vs.* Augustus P Prichard.

The assent of three fourths in value of the creditors of an insolvent debtor, which is requisite to his second discharge under *St.* 1844, c. 178, § 5, must be filed within six months of the date of the assignment.

Action of contract upon a promissory note. Answer, a certificate of discharge in insolvency. Replication, that the defendant had once before taken the benefit of the insolvent law; and that upon the second insolvency his estate did not pay fifty per cent. of the claims proved against it, and three fourths in value of his creditors did not, within six months of the assignment, assent to his discharge.

At the trial in the superior court of Suffolk at May term 1856, *Nash*, J. ruled "that the fact that the assent of three fourths in value of his creditors was not given and filed within six months after the assignment, if proved, would not invalidate

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the discharge; that it was sufficient if given and filed before the discharge was granted; this being a case of a second insolvency by the defendant under the statute." A verdict was taken for the defendant, and the plaintiff alleged exceptions.

H. C. Hutchins, for the plaintiff, cited *St.* 1844, *c.* 178, §§ 4, 5, 9; *Buck* v. *Sayles*, 9 Met. 459; *Gates* v. *Campbell*, 8 Cush. 104; *Revere* v. *Newell*, 4 Cush. 584; *Beverly Bank* v. *Wilkinson*, 2 Gray, 519; *Merriam* v. *Richards*, 3 Gray, 252; *Williams* v. *Robinson*, 4 Cush. 529; *Sanderson* v. *Taylor*, 1 Cush. 87.

C. Robinson, Jr., for the defendant. By *St.* 1844, *c.* 178, § 4, a debtor whose estate pays less than fifty per cent. on all claims proved against it is entitled to a certificate of discharge "unless a majority in value of his creditors who shall have proved their claims shall dissent therefrom within six months after the date of the assignment." By § 5 a debtor insolvent for a second time, and whose estate pays less than fifty per cent., is not to be discharged "unless three fourths in value of the creditors whose claims are proved shall assent thereto in writing." The omission in § 5 of the limitation of six months, inserted in § 4, shows that a debtor who is obliged to obtain the assent of a larger proportion of his creditors is not to be limited to that time. At most, this limitation applies only to obtaining the assent of a majority of the creditors, not of three fourths. The *St.* of 1848, *c.* 304, § 9, is a substitute for § 4 only of *St.* 1844, *c.* 178. *Gates* v. *Campbell*, 8 Cush. 106. Dwarris on Sts. (2d ed.) 604.

Thomas, J. The point raised by the bill of exceptions is the validity of the defendant's discharge in insolvency. The defendant was insolvent for a second time and his estate failed to pay fifty per cent. of the debts and claims proved. He could not therefore obtain his discharge, or if obtained it would not be valid, unless three fourths in value of the creditors whose claims were proved should assent thereto in writing. *St.* 1844, *c.* 178, § 5. The question in issue between the parties is when such assent may be filed; whether it must be filed within six months after the date of the assignment.

Though the fifth section of the *St.* of 1844, *c.* 178, does not,

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considered separately, in terms impose this limitation, yet from the provisions of the fourth and fifth sections taken together, as *in pari materia*, we think such limitation is the fair conclusion. Upon any other construction, there would be no limit to the time of filing such assent. This we understand to have been the construction heretofore given to the statute, though the precise point involved in the case at bar was not raised. In *Gates* v. *Campbell*, 8 Cush. 104, it was held, that the creditors whose assent would authorize the discharge must be creditors whose claims were proved within six months after the date of the assignment. The reason given for the restriction is that the statutes set six months as the time within which the assent is to be given and the discharge acted upon. 8 Cush. 108.

A new trial must be had, but the parties will observe that the conclusion which the court has reached seems to dispose of the cause. *Exceptions sustained.*

WILLIAM BRIGHAM & another *vs.* DANIEL J. COBURN.

A writ sued out by an assignee of the estate of an insolvent debtor need not aver that he is such under the insolvent laws of the Commonwealth.

The affidavit of a party to a suit, that he has made diligent search for a deed of assignment to him under the insolvent laws, and that it has been lost or mislaid, and is not to his knowledge recorded, is sufficient to allow the introduction of secondary evidence of its contents.

The testimony of the clerk of a commissioner of insolvency, that he drew the assignment of the estate of an insolvent debtor, and kept no copy of it; but that the blank form of a copy produced by him was the same used by the commissioner, and that he has filled it up from minutes on his docket, and believes it to be a correct copy of the assignment, is sufficient to verify the copy.

ACTION OF TORT for the conversion of a gold watch. The plaintiffs described themselves in the writ as "assignees of Stephen G. Bass, an insolvent debtor."

The answer denied all the plaintiffs' allegations; and also contained a demurrer to the declaration, for the reason "that it did not state that the plaintiffs were the assignees of said Bass

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under the insolvent law of 1838 and the statutes in amendment thereto, or otherwise."

In the superior court of Suffolk at March term 1856, *Nelson*, C. J. overruled the demurrer, and ordered the trial to proceed, and the further proceedings were stated in the bill of exceptions thus:

"The plaintiffs filed an affidavit of one of the plaintiffs, that he had made diligent search for a deed of assignment, and that it was lost or mislaid, and that it was not, to his knowledge, recorded in the registry of deeds. The defendant objected that this affidavit was not sufficient to enable the plaintiffs to prove the contents of said deed by secondary evidence. But the presiding judge overruled the objection.

"The plaintiffs then called the clerk of Francis Hilliard, Esq., commissioner of insolvency, who testified that he drew the assignment in the case of said Bass; that he kept no copy of said assignment. He then produced a copy of a deed of assignment, and testified that the blank form in which it was made was the same used by Mr. Hilliard, and that the witness had, since the commencement of the trial of this case, filled it up from certain minutes on the docket kept by him of the proceedings in the case of said Bass, and that he believed it to be a correct copy of said assignment. The plaintiffs then offered to put this alleged copy into the case. This was objected to by the defendant. But the objection was overruled by the presiding judge."

The jury returned a verdict for the plaintiffs, and the defendant appealed from the judgment upon his demurrer, and excepted to the other rulings.

J. G. King, for the defendant.

W. Brigham, for the plaintiffs.

METCALF, J. The demurrer in this case was rightly overruled by the superior court. The only cause assigned for it is the omission of the plaintiffs to describe themselves as assignees under the insolvent laws. They describe themselves as "assignees of Stephen G. Bass, an insolvent debtor." But no assignee of a debtor's property can maintain an action, as

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assignee, unless he has been appointed under the insolvent laws, and has received an assignment of the debtor's property, under those laws. Nor can any administrator maintain an action, as administrator, unless he has been appointed by the right judge of probate, and has given bond to perform his trust. *Langdon* v. *Potter*, 11 Mass. 314. *Davis* v. *Davis*, 2 Cush. 113. Yet he does not and need not aver, in a declaration, that he was appointed by the rightful authority, or has qualified himself by giving bond. 11 Mass. 314. By describing himself as administrator, he is understood to describe himself as a lawfully authorized and qualified administrator, without an averment that he is such. And if his authority is not admitted, he must prove it, or fail in his suit. So, as it seems to us, when an assignee of an insolvent debtor sues as such, it is to be understood, without his so averring, that he is assignee under the insolvent laws, (by which alone he is enabled to sue,) and has received, from the commissioner or judge of insolvency, an assignment of the debtor's property; and that it is sufficient for the maintenance of the action, if he prove his qualifications, when they are not admitted. See 7 B. & C. 406.

In strict legal accuracy, the plaintiffs should have termed themselves assignees, not of Bass, but of his estate; as an administrator should term himself administrator, not of the deceased intestate, but of his estate. Whether, if this too common inaccuracy had been specially pointed out as a demurrable defect in the declaration, the demurrer ought to have been sustained, we have not inquired. As it was not thus pointed out, we must disregard it. *St.* 1852, *c.* 312, § 21.

The first ground of exception taken to the proceedings at the trial is the admission of secondary evidence of the deed of assignment to the plaintiffs, upon the affidavit of one of them as to the loss of that deed.

The law requires, as preliminary to the reception of secondary evidence of a document, only such proof as induces a legal presumption of the loss of that document. And this question of legal presumption must often be addressed to the discretion of the judge before whom the trial is had. 1 Greenl. Ev. § 558.

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The affidavit in this case has not been exhibited to us; and we cannot perceive, from the general statement of its contents, as set forth in the exceptions, that it did not raise a reasonable and legal presumption of the loss of the deed, according to the established rules of evidence. The question, what is due inquiry for a deed or other document, in order to admit secondary evidence of it, must be decided upon the particular circumstances of the case in which that question arises. *Miller* v. *Miller*, 1 Hodges, 187. 2 Phil. Ev. (N. Y. ed. 1849,) 229, 230. "In ordinary cases," says Mr. Baron Alderson, "you do not make search as for stolen goods. The court must be reasonably satisfied that due diligence has been used; it is not necessary to negative every possibility — it is enough to negative every reasonable probability — of anything being kept back." *M'Gahey* v. *Alston*, 2 M. & W. 214. Upon the circumstances of the case before us, we cannot decide that secondary evidence was wrongly admitted. The case of *Page* v. *Page*, 15 Pick. 374, shows that the affidavit of the other assignee and plaintiff was not indispensable to the admission of such evidence.

The next exception is to the competency and sufficiency of the secondary evidence which was admitted. But we think it was both competent and sufficient. The effect of that evidence was, that a deed of assignment of Bass's property was made to the plaintiffs, by the commissioner of insolvency, in the form of that which the witness exhibited as a copy. The correctness of that form has not been questioned by the defendant.

Demurrer and exceptions overruled.

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NEW ENGLAND STEAM AND GAS PIPE COMPANY *vs.* WILLIAM B. PARKER & another.

It is no defence to a bond to dissolve an attachment, that within thirty days after judgment in the original action the principal took the benefit of the insolvent laws.

ACTION OF CONTRACT on a bond made by Hubbard Blakesley as principal, and the defendants as sureties, to dissolve an attachment on mesne process. The case was submitted to the decision of the court upon the following statement of facts:

The due execution and delivery of the bond are admitted. In the action in which it was given, the plaintiffs recovered judgment on the 26th of March 1856, upon which execution issued the day following. That judgment is wholly unsatisfied. On the 7th of April 1856 a warrant in insolvency was issued against Blakesley upon his own petition, the first publication of notice of which was on the 8th of April. If these proceedings in insolvency are a good defence to this action, judgment is to be entered for the defendant; otherwise, for the plaintiff.

B. Dean, for the plaintiff.

M. G. Cobb, for the defendants, cited *St.* 1838, *c.* 163, § 7; *Loring* v. *Eager*, 3 Cush. 188; *Murray* v. *Shearer*, 7 Cush. 333; *Sampson* v. *Clark*, 2 Cush. 173.

METCALF, J. The plaintiffs are entitled to judgment on this statement of facts. The condition of the bond, which the defendants executed as sureties, has been broken. Judgment was recovered against the principal before he applied for a discharge under the insolvent laws, and neither he nor the defendants paid the amount of the judgment within thirty days after it was rendered. The discharge of the principal from that judgment, and from his obligation on his bond, does not discharge the defendants from their obligation. It is provided by *St.* 1838, *c.* 163, § 7, that no discharge of any debtor, under that statute, shall release or discharge any person who may be liable for the same debt as a surety for the debtor. Judgment

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must therefore be entered for the penalty of the bond, and the defendants will be heard in chancery as to the sum for which execution shall issue. If the plaintiffs have proved their judgment against the principal before the commissioner of insolvency, the defendants may probably have the amount of the dividend, which is decreed thereon, deducted from the sum for which they would otherwise be liable. This, however, and other questions, cannot be definitely settled previously to the hearing in chancery. *Judgment for the plaintiffs.*

SAMUEL PUTNAM *vs.* SAMUEL B. CUSHING.

A mortgagee of chattels may maintain replevin for them after their attachment by trustee process against the mortgagor, without making the demand required by Rev. Sts. c. 90, §§ 78, 79.

A mortgage of leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor.

REPLEVIN of eleven cases of brogans. At the trial in the superior court of Suffolk at May term 1856, it appeared that George A. Putnam made to the plaintiff a mortgage of brogans, and of stock for the manufacture of brogans, which stock was then cut and prepared for the soles and the upper leather to be closed, and was afterwards made up into brogans by the mortgagor; that some of the brogans mortgaged, and of the brogans so made up from the mortgaged stock, were delivered by the mortgagor to the defendant for sale, and while in the defendant's possession were attached by trustee processes against the mortgagor, which were still pending.

The defendant objected to the maintenance of the action, that the plaintiff had not made a demand upon the attaching officer, as required by the Rev. Sts. c. 90, §§ 78, 79; and that the mortgage of stock did not cover brogans manufactured out of it at the expense of the mortgagor.

But *Huntington, J.* overruled both objections, the jury re-

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turned a verdict for the plaintiff, and the defendant alleged exceptions.

W. Brigham, for the defendant.

T. F. Nutter, for the plaintiff.

Dewey, J. 1. There was no such attachment of the mortgaged property in the present case as made it necessary for the mortgagee to make the demand required by Rev. Sts. *c.* 90, §§ 78, 79. The provisions of the statute apply to an attachment of goods by an actual seizure of the same. In such case, before the mortgagee can maintain an action to recover possession of the same, or damages therefor, he must make a statement of his claim to the attaching creditor or officer, and demand payment of the same. If not paid in the time required by law, "the property shall be restored to him." But in the present case, the attachment is by trustee process, leaving the property in the hands of a third person, and under a form of attachment setting forth that it cannot be seized by the officer in the usual way. It is said that if this be so, you cannot effectually attach mortgaged goods and chattels by the trustee process merely, but must go further and make an actual seizure of the same. This may be so, so far as the provisions of *c.* 90, §§ 79, 80, are to be called in aid of the attachment. In the case of goods and chattels, they would ordinarily be open to actual attachment, and all the benefits of the statute might be secured by making such actual seizure. However that may be, in the opinion of the court, a mere attachment by serving a trustee process upon the person who may be in possession of the same would not defeat the right of the mortgagee to reclaim the goods mortgaged to him, by a writ of replevin against such person, without making a statement of the amount of his lien, and making demand of payment therefor.

2. The only remaining exception now relied upon is that the mortgage of the stock for the manufacture of the brogans would not entitle the plaintiff to hold his lien upon the brogans after they were manufactured from such stock. In the opinion of the court, the property still remained in the mortgagee, notwithstanding the change by the completion of the work as orig-

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inally designed, the materials being cut and prepared therefor before the mortgage. It was not the case of a new acquisition of articles of property, not held by the mortgagor at the time of making the mortgage; but merely of labor performed upon materials and stock of the plaintiff acquired by his mortgage. In such case, the accession will pass to the mortgagee.

Exceptions overruled.

GEORGE W. HEWES *vs.* WILLIS HANSCOM.

An agreement between the maker and the payee of a promissory note, that it shall be deemed to be paid by being allowed in discharge of a mortgage from the payee to a third person, cannot have that effect without the assent of that person.

ACTION OF TORT for malicious prosecution and false imprisonment. At the trial in the superior court of Suffolk at September term 1856, before *Nelson*, C. J., it appeared that the prosecution complained of was an action upon a promissory note of the plaintiff's for $42, payable to Charles Curry; and the plaintiff offered evidence to prove the following facts, many of which were controverted by the defendant.

The plaintiff, while in California, sent home the sum of $160 to his mother, to be lent by her to his brother Elijah Hewes, which she did, and he gave her back a note and mortgage on his blacksmith shop and tools, which she has ever since had, and has tried to collect. Subsequently Elijah Hewes formed a copartnership with the defendant under the name of Hewes & Hanscom, and then the defendant undertook to pay this note and mortgage given by Elijah Hewes to his mother. The plaintiff's note was offered to Hewes & Hanscom in payment for work, and they corresponded with the plaintiff about it; he at first denied his liability upon it, but finally consented that they should take it and apply it on the mortgage to his mother; his mother afterwards applied to Elijah Hewes for a pay ment on the mortgage in the defendant's presence, and he

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referred her to the defendant, who promised to pay her. The partnership of Hewes & Hanscom was afterwards dissolved, and by arrangements between them Elijah Hewes released the defendant from his promise to pay the mortgage, and the plaintiff's note became the defendant's property.

"The plaintiff asked the court to instruct the jury, that if they were satisfied that there was between the parties a question as to the validity of the note against this plaintiff, and the defendant took the note after negotiations with the plaintiff, under an agreement to apply it on the mortgage, and the defendant took the note up, paying for it in work, to apply as cash on the mortgage, and the plaintiff agreed to its being taken up only for that object, and Elijah Hewes transferred his half interest to the defendant for the purpose and with the understanding of having it so applied, the defendant had no cause of action on the note, till he had offered so to apply it, and had been refused; and no release by Elijah Hewes afterwards would avail against this plaintiff, unless assented to by him. This instruction, in these terms, was refused.

"The court instructed the jury in regard to the legal nature of the action for malicious arrest and prosecution, and the burden of proof in such action, and submitted to the jury the whole question of fact; also that, on one part of the case, if the plaintiff had furnished the $160, and had voluntarily paid the mortgage to his mother, and she afterwards undertook to hold and control it, then there would afterwards be no legal privity, as regarded the mortgage, between the plaintiff and the defendant; and though it might have been agreed between them that the $42 Curry note should be paid by the mortgage, yet, under the circumstances, it would not be paid till an indorsement had been made on the mortgage note. On these instructions the jury returned a verdict for the defendant, and to the above instructions and refusals to instruct the plaintiff excepts."

W. L. Burt, for the plaintiff.

S. C. Maine, for the defendant.

THOMAS, J. It is not easy to understand from the bill of ex-

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ceptions the precise aspect which the cause assumed at the trial, or the precise instructions given to the jury. A prayer for instructions by the plaintiff is stated in the bill, and it is said that "this instruction, in these terms, was refused." The bill proceeds to state that general instructions were given as to the nature of the action and the burden of proof; and that as to one part of the case the instructions were given which are particularly set forth in the bill.

The instructions so reported were, it seems to us, correct. Whether an executory agreement of the plaintiff and defendant, that the note should be deemed to be paid by being allowed in discharge *pro tanto* of a mortgage held by the plaintiff, could be regarded as in itself payment and a bar to a suit upon the note, it is not necessary to determine. But it is plain that such agreement could not be treated as payment, where the legal title to the mortgage was in a third person, and that third person assume to control the mortgage and to enforce its collection.

The bill of exceptions shows no error in the instructions of the court below, to justify this court in setting aside the verdict and granting a new trial. The plaintiff, seeking a new trial, must clearly establish such error. If he fails to do so, the verdict must stand. It may be possible that the bill of exceptions does not fully present the points of law the plaintiff wished to make; but on the other hand, looking at the general aspect of the case as developed in the bill, it is difficult to suppose that upon an original suit, presenting so many controversies of fact and difficulties of law, an action for malicious prosecution could be maintained. *Exceptions overruled.*

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EDWARD H. BARKER & others *vs.* EDWIN PARKER.

An accommodation indorser, before maturity, of a negotiable promissory note, given to a mutual insurance company for premiums, who has been obliged to pay the amount thereof to a subsequent indorsee, may recover the amount so paid of the maker, on a count for money paid; or, *it seems*, as indorsee of the note; although when he indorsed the note, the insurance company, as he knew, had become indebted to the maker for the amount of a loss larger than the amount of the note.

ACTION OF CONTRACT by the second indorser against the maker of a negotiable promissory note. The declaration contained two counts, one for money paid, and the other on the note.

At the trial in the superior court of Suffolk, at November term 1856, there was evidence of these facts: The note was made by the defendant, payable to the Commercial Mutual Marine Insurance Company for a policy of insurance, and indorsed by them, and at their request by the plaintiffs, Edward H. Barker & Company, in order to enable them to have it discounted, which they did, by the Bank of Commerce. At its maturity the note was duly demanded and protested, and the insurance company being unable to pay it, the plaintiffs took it up and commenced this action. Before the plaintiffs indorsed it, a loss amounting to more than the amount of the note had occurred under a policy issued by the insurance company to the defendant, and been duly adjusted, which the defendants sought to set off in this suit. The plaintiff who made the indorsement on the note was a director in the insurance company and cognizant of the loss, and of the company's liability thereon.

Huntington, J. ruled that upon these facts the plaintiffs could not recover. A verdict was taken for the defendant, and the plaintiffs alleged exceptions.

F. A. Brooks, for the plaintiffs.

C. T. Russell, for the defendant, cited 2 Robinson's Pract. 224, 226 & cases cited; Story on Notes, § 133; *Richardson* v. *Lincoln*, 5 Met. 201; *Moies* v. *Bird*, 11 Mass. 436; *Tenney* v *Prince*, 4 Pick. 385; *Oxford Bank* v. *Haynes*, 8 Pick. 423

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Bromage v. *Lloyd*, 1 Exch. 32; *Emmett* v. *Tottenham*, 8 Exch. 884; *Thompson* v. *Hale*, 6 Pick. 259; *Cone* v. *Baldwin*, 12 Pick. 545; *Merriam* v. *Granite Bank*, 8 Gray, 254.

DEWEY, J. The relation of the plaintiffs to the note in suit was that of second indorsers of a negotiable promissory note of the defendant, who became such indorsers before the maturity of the note, and who, upon the neglect of the maker to pay the same, became liable therefor to a subsequent indorsee holding the note by a transfer before the same was due, and who had made the plaintiffs chargeable with the payment of the same by making a proper demand upon the maker, and giving due notice to the plaintiffs as indorsers. The indorsee thus holding the note before maturity was the Bank of Commerce. As respects the right of the Bank of Commerce to have recovered the note of the defendant, no question can exist.

A liability also devolved upon the plaintiffs, by reason of their indorsement, to pay the same, if not paid by the defendant. Such liability by reason of the indorsement gave the plaintiffs a right to recover of the maker for money paid by them as such indorsers, independently of any right or title to the note itself, acquired by a transfer to them from the Bank of Commerce. The defendant, by putting in circulation a negotiable promissory note, payable to the promisee or his order, created that privity between himself and a second indorser, that such second indorser, upon being required to pay the same by reason of the default of the maker, might recur as well to the maker as to the first indorser for remuneration for the money thus paid.

As there was no good defence, by reason of any set-off against the insurance company, as against the claim of the Bank of Commerce, so there can be none against the claim of a second indorser, who has been obliged to pay the note to the Bank of Commerce, the note being in fact the note of the maker and given for his debt.

The fact that the plaintiffs became second indorsers at the request of the first indorser does not prevent their recurring to the maker in case the note is dishonored and they have been required to pay the same as indorsers.

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Nor do we perceive any legal objection to the right of the plaintiffs to recover under their second count, if it were necessary to resort to that. It is true that they received the note from the Bank of Commerce after it was due. Of course they took it subject to any defence that might have been made had it been sought to be enforced in a suit by the Bank of Commerce. But no set-off or other equitable defence existed as against the Bank of Commerce. So far as any set-off is relied upon by reason of a demand due from the insurance company to the defendant, as it could not avail as against the bank, it would seem to be also unavailing as against a party who had succeeded to the rights of the bank by a transfer from them.

In the opinion of the court it was not competent in defence of this action to introduce the matter relied upon in the answer; and the ruling of the superior court, that the facts found or admitted constituted a valid defence, was erroneous.

Exceptions sustained.

EDWARD H. BARKER & others *vs.* HENRY C. VALENTINE & another.

In an action by an indorsee against the maker of a negotiable promissory note, payable to an insurance company, and indorsed to the plaintiff before its maturity, claims against that company cannot be set off, although the indorsee knew that the note was given for premiums of insurance.

ACTION OF CONTRACT on a promissory note, payable to the Commercial Mutual Marine Insurance Company or order, and indorsed by them to the plaintiffs, and bearing on its face the number of a policy for which it was given.

At the trial in the superior court of Suffolk at November term 1856, the defendants proved a loss under the policy, which had not been paid, and sought to set it off against the note; and it was proved that one of the plaintiffs was a director of the company, and knew that the note was given for premiums.

Huntington, J. instructed the jury, "that as the plaintiffs, or one

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of them, had actual notice, when they received the note declared upon, that it was a premium note given by the defendants to said company for premiums of insurance, upon the facts found or admitted in the case, they took it so far subject to such equities and such defences as the same would have been subject to, if held by the company."

A verdict was taken for the defendants, and the plaintiffs alleged exceptions, which were argued before the decision of the next preceding case of *Barker* v. *Parker*, *ante*, 339.

A. H. Fiske, for the plaintiffs, was stopped by the court.

M. G. Cobb, for the defendants, cited Rev. Sts. *c.* 37, § 31; *St.* 1851, *c.* 281, §§ 13–17, 20; *Williams* v. *Cheney*, 3 Gray, 215, and 8 Gray, 206; Chit. Con. (8th Amer. ed.) 265; 1 Greenl. Ev. § 112.

THOMAS, J. The note in suit was given to the Commercial Insurance Company for premiums of insurance. It is a negotiable note. It was negotiated and indorsed to the plaintiffs, for value, before its maturity. The fact that the note was given for premiums of insurance was known to the plaintiffs when they took it, that is, they knew that the consideration of the note was a good one.

The presiding judge instructed the jury that the plaintiffs, by reason of such knowledge, took the note subject to the equities and defences to which it would be liable in the hands of the insurance company, and that the defendants might avail themselves, in defence to this suit, of claims accruing against the insurance company, even after the negotiation of the note.

Obviously these instructions take the note in suit out of the ordinary well settled rules of law. The contract of the defendants was not simply to pay the insurance company, but to pay whomsoever the insurance company should order them to pay. If the contract was a legal one, if there was nothing in the relation of the makers of the note to the insurance company, which would prevent their giving, or the company receiving and using, a negotiable note for premiums of insurance, the instructions given to the jury were erroneous. We listened to the argument of counsel; we have examined the statutes on the subject

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of mutual insurance companies; without discovering any ground upon which we can say that the contract could not be lawfully made, or enforced as made.

The only case relied upon by the defendants' counsel is that of *Williams* v. *Cheney*, 3 Gray, 215. That case, we think, proceeds upon the ground that mutual insurance companies might well take a negotiable note; that a *bona fide* holder of this note for value might maintain his action upon it; and that the action of the insurance company and of the maker of the note after its negotiation could not impair the rights of the indorsee. The case, as we understand it, is in conflict with the grounds of defence relied on in the case at bar.

Exceptions sustained.

ALFRED NOXON *vs.* THOMAS L. DE WOLF & another.

In an action by an indorsee against the maker of a negotiable promissory note, indorsed by the payee in blank, to which the defence is failure of consideration, the presumption is that it was transferred to the plaintiff on the day of its date, unless the defendant shows that the note was indorsed after maturity, or remained the property of the payee after the indorsement.

In an action by an indorsee against the maker of a negotiable promissory note, payable at a future day, and indorsed in blank by the payee, the judge refused to instruct the jury that "the burden of proof, the evidence being contradictory, was on the plaintiff to show that the note was discounted by him before it became due;" and instructed them that "if the plaintiff discounted the notes before they were due, and for a valuable consideration, in good faith, he was entitled to recover," and that "the presumption from the notes themselves was that they were indorsed on the day of their date; and if they were shown to have been in the hands of the payee after that time and before they were due, the presumption continued that the indorsement was made after the time when they were thus shown to be in the hands of the payee, and before they were due; and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff after they were due, or that they remained the property of the payee." The defendant did not specifically except to this instruction, nor call the attention of the court to the distinction between *prima facie* evidence and changing the burden of proof. *Held*, that he had no ground of exception.

In an action by the indorsee against the maker of a negotiable promissory note, the testimony of a bookkeeper who examined the plaintiff's books at a time not shown to have been after the indorsement, that the books showed that all the payee's notes had been sent to the indorsee for collection, but he could not say the note in suit was enumerated among those sent, is inadmissible for the plaintiff.

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ACTION OF CONTRACT by an indorsee against the makers of the following promissory note:

"Boston, October 18, 1853. Fourteen months after date we promise to pay the Hudson River Marine and Fire Insurance Company or order, for value received, three hundred and thirty dollars $\frac{88}{100}$, payable at Tremont Bank, Boston.

"Thomas L. De Wolf & Co."

At the trial in the superior court of Suffolk at March term 1856, before *Nelson*, C. J., the defendants relied upon the fact that the note was a premium note, given by them for a policy of insurance on a vessel for one year, with liberty to cancel the policy, paying a *pro rata* premium, if the vessel should be sold within the year, which was done, and a proportion only of the premium therefor was due.

The defendants also offered evidence that, before the note became due, a loss to an amount exceeding the sums payable on the note, happened to another vessel on which they had insurance at the same office. It was admitted that the plaintiff took the note with knowledge that it was a premium note; but there was no evidence of any knowledge on his part of the terms of the contract of insurance, or of the cancelling of the policy, or of the loss.

The presiding judge ruled, that if the plaintiff discounted the notes before they were due, and for a valuable consideration, in good faith, he was entitled to recover.

The plaintiff offered evidence that he discounted the notes on the 21st of February 1854, before they became due. The defendants offered evidence to show that the notes were in the possession of the insurance company till the 15th of February, and that the company stopped business on the 21st; and then offered the testimony of a book-keeper that he had thoroughly examined the books of the company on the 26th of February 1855, and that it appeared on their books that all their premium notes were left with the plaintiff for collection, but he could not say that these two notes were entered among them. The presiding judge excluded the testimony.

Upon the evidence the defendants argued to the jury that the

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notes were not discounted by the plaintiff, but were left for collection; and contended that the burden of proof, the evidence being contradictory, was on the plaintiff, to show that the notes were discounted by him before they became due; and argued that the bookkeeper's testimony was not entitled to credit. The residue of the bill of exceptions was as follows:

"The presiding judge in his charge left to the jury the single question, whether the notes were discounted by the plaintiff before they were due, in good faith, without notice; and instructed them that the presumption from the notes themselves was that they were indorsed on the day of their date; and that if they were shown to have been in the hands of the insurance company after that time, the presumption continued that the indorsement was made after the time when they were thus shown to be in the hands of the insurance company, and before they were due; and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff after they were due, or that they remained the property of the insurance company.

"The jury found a verdict for the plaintiff, and the defendants excepted to the instructions and rulings of the court."

C. W. Loring, for the defendant. 1. The judge erred in ruling that the burden of proof was on the defendants to show that the notes remained the property of the payees or were passed after they were due. *Burnham* v. *Allen*, 1 Gray, 496. *Delano* v. *Bartlett*, 6 Cush. 364. The defendants, having contended and expressly requested the judge to rule that the law was otherwise, were not bound to except specifically to his ruling before verdict. *Buckland* v. *Charlemont*, 3 Pick. 173.

2. The bookkeeper's testimony should have been admitted. The acts of the insurance company might be proved by its records; and those not being within the compulsory jurisdiction of the court, secondary evidence of their contents was admissible. *Boyle* v. *Wiseman*, 11 Exch. 360. *Doe* v. *Ross*, 7 M. & W. 102. *Brown* v. *Wood*, 19 Missouri, 475. The books were competent to show that the corporation had not authorized the notes to be indorsed to the plaintiff for discount. An-

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gell & Ames on Corp. § 680. *Union Bank* v. *Knapp*, 3 Pick. 96.

P. W. Chandler & G. O. Shattuck, for the plaintiff.

Dewey, J. 1. The plaintiff sues as indorsee of a negotiable promissory note, payable at fourteen months after date, and proves the execution of the note by the maker, and an indorsement duly made by the payee, without any written date. The defence set up by the maker as to a part of the note is, that it ought not to be enforced, because the consideration was the receipt from the payee of a policy of insurance which was subsequently cancelled in part by agreement of the parties, thereby reducing the sum that ought to be paid thereon; and as to the residue, that before the note became due, an indebtedness to a greater amount from the payee to the maker had arisen by reason of a loss on another policy on a different vessel.

The plaintiff denies the right of the maker to interpose this defence as against an indorsee, holding the note duly indorsed in the manner this was; and contends that before such defence can be made available, the defendant must show that the note was overdue when it was indorsed; and such was the ruling of the court before which the case was tried.

No doubt, in a suit between the original parties to a promissory note, when the defence is want of consideration, the burden of proof is on the plaintiff. But the words "value received" make a *prima facie* case, sufficient to sustain that burden until it is overcome by other evidence put into the case. The cases of *Burnham* v. *Allen*, 1 Gray, 496, and *Delano* v. *Bartlett*, 6 Cush. 364, cited by the defendants, were between the original parties. But the party who executes a negotiable promissory note, payable at a future day, assumes towards an indorsee a very different relation from that which he bears to the payee himself while holding the note. Such defence of a failure in part of consideration, and an indebtedness to the maker by the payee, accruing before the maturity of the note, is only open to the maker upon the fact appearing that the note was negotiated after it was due, or in other words, was a dishonored note. Otherwise, the indorsee may well rely upon showing a nego-

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tiable note duly indorsed by the payee without date. If nothing more is shown, the plaintiff may enforce it as a note indorsed antecedently to its becoming due.

Thus it was held in *Hendricks* v. *Judah*, 1 Johns. 319, in an action by an indorsee of a promissory note against the maker, the latter will not be allowed to prove a set-off against the original payee, unless he previously shows that the note was transferred after it became due, or for the purpose of defrauding the maker. Such was the ruling of Spencer, J. at the trial, which was confirmed by the full court.

In *Webster* v. *Lee*, 5 Mass. 334, where, in an action by an indorsee against the maker of a promissory note, the defendant set up in defence a submission of all demands, including this note, to referees, a report and judgment thereon, it was held by the court that it was not the duty of the plaintiff, an indorsee by a blank indorsement, to show that he purchased the same before the articles of submission were made. Parsons, C. J. says, in that case, "if the maker of the note would set up the defence of payment, it is necessary for him to prove that the payment was made before the indorsement, or his defence will fail him."

In *Stevens* v. *Bruce*, 21 Pick. 193, which was an action by indorsee against maker, and the defence set up was payment to the payee, Morton, J. on the trial ruled that the defendant must first prove that the note was overdue before it was indorsed. In the consideration of the case by the full court, this ruling was assumed to be correct, and the only point of controversy was whether the defendant had introduced sufficient evidence to warrant the jury in finding that fact.

In the case of *Ranger* v. *Cary*, 1 Met. 369, the point seems to have been directly before this court, and the rule stated to be that "a negotiable note being offered in evidence, duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defence that would be open to him only in case the note were negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue."

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The earlier case of *Wilbour* v. *Turner*, 5 Pick. 526, and the later one of *Hilton* v. *Smith*, 5 Gray, 400, seem to have recognized the same principle.

In *Parkin* v. *Moon*, 7 Car. & P. 408, it was held by Baron Alderson, that the burden of proving that the note was indorsed after it was overdue was upon the defendant, where he sought to defend by showing such facts as would constitute a good defence to a dishonored note; and this ruling, being submitted to the other judges, was confirmed by them.

It may be that under the more precisely accurate use of the term "burden of proof," as now held by the court, it would have been more correct to say that upon the production by the holder of a negotiable promissory note, indorsed in blank, the legal presumption is that it was indorsed at its date, and it is incumbent on the defendants to overcome that presumption by evidence. This must have been so understood in the present case, as the plaintiff had already produced a note thus indorsed, and the question was upon the effect of the testimony offered to show the fact that it was indorsed after overdue. Upon such a state of the case, it was the duty of the defendants to offer sufficient evidence to control the legal presumption arising from the indorsement of the note. In this sense the burden was on the defendants.

2. The exclusion of the testimony of the bookkeeper was correct. Without considering the broader question of the competency of evidence to show that, upon an examination of the books of a corporation, the witness did, or did not, find certain facts to be indicated by the books, it is sufficient to say that it does not appear that the entries testified of were made while the party making them had possession of the note now in controversy. Declarations of one who has been the holder of a bill of exchange or promissory note cannot properly be received in evidence, unless made while the party has possession of the bill or note. *Pocock* v. *Billing*, 2 Bing. 269, and 9 Moore, 499. *Bond* v. *Fitzpatrick*, 4 Gray, 91, and 8 Gray, 538.

It is also to be remarked that the witness says he cannot state that this note was among those entered upon the books

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of the corporation as lodged with the bank for collection. The proposed evidence fails to establish any declaration of the company on their books that they had left this note with the bank for collection. *Exceptions overruled.*

THEODORE NEWELL vs. FREDERIC HOLTON.

In an action against the maker of an accommodation note, the person for whose accommodation it was made is a competent witness to prove that he negotiated it for a usurious consideration, in another state, whose laws render usurious contracts void, to a party from whom the plaintiff took it after maturity.

ACTION OF CONTRACT on a promissory note made by the defendant to Henry Burr or order, indorsed by the latter to Horace Burr and by him to Lot Newell.

At the trial in the superior court of Suffolk at September term 1856, it was admitted that the plaintiff took the note from Lot Newell after maturity. The defendant introduced evidence tending to show that the note was made by the defendant and indorsed by the payee for the accommodation of Horace Burr, without any consideration from either of them; and then offered the deposition of Horace Burr to show that he transferred the note to Lot Newell in New York for a usurious consideration, in violation of the laws of New York, which render all usurious contracts void. But *Nelson*, C. J. refused to admit it, on the ground that Horace Burr, being a party to the note, was not a competent witness to show that it was tainted with usury and void. The verdict being for the plaintiff, the defendant excepted to the rejection of this deposition, and to other rulings not material to be stated.

A. A. Ranney, for the defendant.

A. H. Fiske, for the plaintiff.

DEWEY, J. It being conceded that the note was passed to the plaintiff after its maturity by Lot Newell, the same was subject to any defence that existed against it in the hands of

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Lot Newell at the time when he transferred it to the plaintiff. If it shall further appear, as the evidence offered tended to prove, that this note was an accommodation note, made by the defendant at the request of Horace Burr, whose name appears as the second indorser thereon, and that it was in fact held by Horace Burr to be used by him to raise money thereon for his own benefit, having never been put in circulation before it was passed by him to Lot Newell, the note must be considered as first issued when negotiated to Lot Newell In such case, if the note passed to Lot Newell upon an usurious agreement made with him by Horace Burr, such usury would affect the note, and might be set up in defence of the present action. To prove such usury Horace Burr would be a competent witness, his testimony being offered to prove an original, usurious contract made directly with Lot Newell.

As the law is now held in this commonwealth, an indorser of a promissory note may be a competent witness to a usurious contract made with the person to whom the note is first passed, when such person is the plaintiff, or some one taking the same under such circumstances as would subject him to the same defence as would avail against the party making the contract. Whatever reason there may have been, or whatever the rule may be, as to excluding a party standing in the relation of an indorser to a note, from defeating a note to which he has given currency, by testifying to a previous taint in which the party receiving it did not participate, being an innocent purchaser, it does not affect the present case, supposing Lot Newell, to whose rights the plaintiff succeeds, to have been himself a party to the usurious contract. To this extent the case of *Churchill* v. *Suter*, 4 Mass. 156, has been qualified, and it is unnecessary to go further in the present case. *Fox* v. *Whitney*, 16 Mass. 118. *Van Schaack* v. *Stafford*, 12 Pick. 565. *Thayer* v. *Crossman*, 1 Met. 416. *Bubier* v. *Pulsifer*, 4 Gray, 592.

Without expressing any opinion upon the other points discussed at the argument, for the reason we have stated there must be a new trial. *Exceptions sustained.*

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HENRY EMERSON *vs.* CHARLES E. WHITE.

A tender of the amount of a debt without costs is insufficient, after a writ has been sued out thereon, and sent to an officer for service, although not yet actually delivered to him.

ACTION OF CONTRACT. Answer, a tender of the amount the debt. Trial and verdict for the defendant in the s· court of Suffolk at January term 1857, before *Nelson*, ' signed this bill of exceptions:

"It was in evidence that the writ was made out at t.. tiff's request, and sent to the sheriff for service between the hours of nine and half past nine o'clock in the forenoon; that at or about eleven o'clock of the same forenoon the defendant made the tender and demanded a receipt in full; and afterwards, between said eleven o'clock and two in the afternoon, the defendant renewed his tender, but without condition, and was then informed that costs had been made; that on or about one o'clock of the same afternoon service of said writ was made by attachment of the defendant's property. The court ruled that for the purposes of the tender the commencement of the action was the time when the writ was delivered to the sheriff to be served. And to this ruling the plaintiff excepts."

E. Wright, for the plaintiff, cited *Gardner* v. *Webber*, 17 Pick. 407; *Badger* v. *Phinney*, 15 Mass. 364; *Bunker* v. *Shed*, 8 Met. 150; *Field* v. *Jacobs*, 12 Met. 118; *Johnson* v. *Farwell*, 7 Greenl. 370; 2 Greenl. Ev. §§ 602, 603, 605; Rev. Sts. *c.* 100, § 15.

J. H. Wakefield, for the defendant, cited Rev. Sts. *c.* 100, §§ 14, 15; *Tufts* v. *Kidder*, 8 Pick. 540; *Gardner* v. *Webber*, 17 Pick. 412; *Swift* v. *Crocker*, 21 Pick. 242; *Seaver* v. *Lincoln*, 21 Pick. 269; *Bunker* v. *Shed*, 8 Met. 152; *Underwood* v. *Tatham*, 1 Ind. 276; *State Bank* v. *Cason*, 5 Eng. 479.

DEWEY, J. The ruling of the superior court "that for the purposes of the tender, the commencement of the action was the time when the writ was delivered to the sheriff to be served," was not correct. After the writ was actually made, and measures taken, as in the present case, to secure the service of the same by sending it to the sheriff, a tender of the amount

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of the debt without the costs would not be a valid tender, although there had been no actual delivery of the writ to the sheriff. If the evidence established the fact that the writ was made out, and sent to the sheriff for service, as the bill of exceptions assumes, prior to half past nine o'clock, and the tender was not made until eleven, the court should have instructed the jury that the tender should have been of the amount of the debt and the costs that had accrued, to make it an effectual tender. *Exceptions sustained.*

RUFUS B. STICKNEY & another *vs.* BENJAMIN F. ALLEN.

A mechanic who has agreed to repair and alter stereotype plates, in consideration of being allowed to do the owner's printing for an indefinite time, has no lien on the plates on account of repairs and alterations, when, after several years, the owner withdraws the printing from him.

A lien for work done on chattels is lost by voluntarily surrendering the possession of them to the owner or his agent.

An owner of stereotype plates in the possession of a mechanic who refuses to give them up, except on payment of a bill due for printing, and also of a bill for repairs on the plates, which is not due, is not bound to tender payment of the bill already due if he is ready to pay it on the delivery to him of the plates.

The measure of damages against a wrongdoer for the conversion of plates for printing labels or advertisements, of great value to the owner, but of very trifling value to others, is the value to him; and in estimating this the cost of replacing the plates may be considered.

In an action for the conversion of chattels to the defendant's use, the measure of damages is not affected by the defendant's having, after the conversion, attached them on mesne process against the plaintiff, and then discontinued that action and offered to restore them to the plaintiff, who refused to receive them.

ACTION OF TORT for converting to the defendant's use stereotype plates, the property of the plaintiffs. The declaration alleged no special damage.

The answer denied the plaintiffs' allegations; and alleged, 1st. That the defendant had a lien on the property; 2d. That the property had been attached on a writ in favor of the defendant against the plaintiff, and, on the discontinuance of that action, restored by the attaching officer at the defendant's direction to the plaintiff.

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At the trial in the superior court of Suffolk at September term 1856, before *Nelson*, C. J., the following facts were in evidence:

In 1849 the defendant, an engraver, occupied the same place of business with one Carlton, a printer, who did the plaintiffs' printing under a contract to keep the plaintiffs' plates in order, in consideration of having their printing at certain rates. In the same year the defendant made alterations on some of the plates, and manufactured others for the plaintiffs. The new plates were paid for as the bills for them were presented, but some of the alterations were not paid for; and the plates, new and altered, went into Carlton's hands, as the property of the plaintiffs, to print from. In 1852 Carlton died, and the defendant went into the printing business, and made a contract with the plaintiffs, under which he did their printing till July 1855, when the plaintiffs notified him that they should have their printing done elsewhere; and repeatedly demanded of him their plates, which he refused to give up, unless first paid for the printing and the alterations and repairs.

Before this refusal, the defendant having sent to the plaintiffs his bill for printing, in which was no charge for any alterations or repairs, one of the plaintiffs came with it to the defendant, with money sufficient to pay it, as rendered; the defendant then made a claim for repairs; the plaintiffs offered to pay the bill for printing as rendered, and demanded the plates; but the defendant refused to give them up unless his claim for repairs was also paid, and gave no other reason for not taking the money offered. The plaintiffs would not have paid any money unless they got the plates, but were ready to pay the amount of the bill for printing if they got them.

The defendant requested the court to rule, that if the privilege of having the plaintiffs' printing was a consideration for making the alterations and repairs, yet the plaintiffs, having taken away the former, were bound to pay for the latter. But the court instructed the jury that if in consideration of the printing the defendant had agreed to make the alterations without charge; and the contract, for the continuance of which no time had been fixed, had yet continued and been carried out for several

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years, and then been given up; the defendant would have no lien on the plates on account of the alterations; and the jury might presume that the continuance of the contract had remunerated the defendant for the alterations, if any remuneration was needed.

The plaintiffs contended that the defendant, by delivering the plates to Carlton and allowing him to use them, had relinquished the possession and lost his lien, and that his subsequently receiving the plates again would not revive it. The defendant requested the court to rule that a permissive use of the plates by Carlton, in the place of business jointly occupied by him and the defendant, was not such parting with the possession as would divest the defendant's lien, if the defendant did not allow them to go into the plaintiffs' possession or control, and afterwards received them from Carlton, and made further alterations and repairs on them. But the court instructed the jury, that if the defendant voluntarily parted with the possession to the plaintiffs or their agent, he lost his lien and could not reassert it.

As to the tender, the defendant asked the court to rule, that a mere readiness to pay, unaccompanied with a tender of the money, would not dissolve the defendant's lien, if he had any. But the court instructed the jury upon this point, that "a mere readiness to pay a legal and good demand would be insufficient; but if the plaintiff expressed a willingness to pay any fair and proper bill of the defendants, and said he had the money wherewith to pay it, and really had it present, and offered it, and the defendant refused to deliver the plates unless a further bill for repairs and alterations was also paid, and the readiness to pay was not acceded to for that reason, and the jury found that the bill for repairs was not due, then the defendant could not object that a legal tender for the amount due on the bill for printing was not made."

It appeared that the plates were of very trifling value except to the plaintiffs, but of great value to them, and that they had been obliged to replace them at considerable expense. The defendant contended that in this form of action the rule of damages

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was the market value of the articles. But the court ruled, that the plaintiffs might show the fair value of the articles to themselves, and, as bearing on the question of value, the cost of replacing them, and that the fair worth of the articles to the plaintiffs would be the measure of damages.

It appeared that after the plaintiffs' demand upon the defendant, and before the bringing of this action, the plates were attached on a writ sued out by the defendant against the plaintiffs on said bills; whereupon the plaintiffs tendered payment for the printing, and that action was discontinued, "and the officer undertook to restore the property to the plaintiffs, who refused to receive it, and in some way it came back to the officer, in whose hands at the time of the trial it still remained." The court ruled that the damages would not be affected by the attachment and the alleged return, "if the plates were rightly not accepted by the plaintiffs."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

R. F. Fuller, for the defendant.

O. Stevens, for the plaintiffs.

METCALF, J. The court are of opinion that no error in the trial of this cause is shown by these exceptions.

1. The judge rightly instructed the jury that if the agreement of the parties was, that the defendant, for the sake of doing the printing for the plaintiffs, should do it for a certain sum, and should also make alterations in the plates, without charge, in consideration of doing the printing for an indefinite time, and if the parties acted on this agreement for several years, and then gave it up, and thereupon the plaintiffs demanded the plates, then the defendant had no right to withhold them; and that the jury might presume that the continuance of the agreement had remunerated the defendant for making alterations in the plates. The effect of this instruction was, that a mechanic has no lien on property for labor done on it, when he agrees to do that labor in consideration of being employed and paid by the owner of the property to do other labor for him; such agreement is inconsistent with a right of lien, or is a waiver of it;

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and a jury may rightly presume that the pay received for the other agreed labor is a remuneration for that which is done on the property; it is what he agrees to take, whether a remuneration or not.

2. There can be no doubt of the correctness of the ruling, that if the defendant voluntarily parted with the possession of the plates to the plaintiffs or their agent, he lost his lien and could not reassert it. Smith's Merc. Law, (5th ed.) 540. This ruling was made on the hypothesis that the defendant once had a lien.

3. Taking the whole of the next ruling together, it is manifestly right; being thus: If the jury find that the defendant's bill for repairs of the plates was not due, and that he refused to deliver them to the plaintiffs, on their demand, unless they would pay that bill, then they were not bound to tender payment of the bill which they owed him for printing, if they were ready to pay it on his giving up the plates. *Adams* v. *Clark*, 9 Cush. 215. This ruling was made on the hypothesis that the defendant had a lien on the plates for his bill for printing.

4. The proper rule of damages was prescribed by the judge, namely, the fair value of the plates to the plaintiffs. And he allowed the jury to take into consideration, in estimating that value, the cost of replacing the plates. The defendant insists that the market value was the true rule of damages. And this is doubtless the general rule in trover. But this rule presupposes the conversion of marketable property. Whereas, in this case, it was admitted by the defendant's counsel, in argument, that the plates in question were made for the printing of labels or advertisements in the plaintiffs' names, which were to be used by them only, in their special business; and the exceptions show that it was in evidence that they were of very trifling value, except to the plaintiffs. Such things cannot with any propriety be said to have a market value. And the actual value to him who owns and uses them is the just rule of damages in an action against him who converts them to his own use. *Suydam* v. *Jenkins*, 3 Sandf. 621, 622.

There is no ground for the defendant's objection, that damage to the amount of the value of the plates to the plaintiffs alone

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was special damage, and therefore not recoverable, because not alleged in their declaration. Special damage, in trover, is that which the plaintiff sustains beyond the mere loss of his property by its conversion. *Davis* v. *Oswell*, 7 Car. & P. 804. *Bodley* v. *Reynolds*, 8 Ad. & El. N. R. 779. If the plaintiffs, in this case, had offered evidence that by the loss of their plates their business was obstructed, it would not have been admissible, under their declaration, for the purpose of proving damage beyond the value of the plates. Mayne on Damages, 212.

5. The court, we think, correctly ruled that the attachment and return of the plates did not affect the question of damages.

Exceptions overruled.

TOLMAN WILLEY *vs.* ELEAZER FREDERICKS & another.

One who has contracted to build the sea-wall of a wharf, and failed to perform his contract, and, on being requested to rebuild it, promised to do so, and thereby induced the other party to delay rebuilding it himself, is liable for the loss of rent of the wharf occasioned by his own negligence.

ACTION OF CONTRACT to recover the expense of rebuilding the sea-wall of a wharf, which the defendants had undertaken to build, and had not built according to agreement.

At the trial in the superior court of Suffolk at January term 1857, the plaintiff offered evidence that "the defendants had not fulfilled their contract, and on several occasions between the 1st of January and the 1st of October 1855 had acknowledged that the sea-wall was not built according to their contract, and promised to rebuild it, but had neglected to do so; that the plaintiff informed the defendants that, unless they rebuilt the wall, he should do it at their expense; and that he rebuilt the wall in October and November 1855, at an actual expense of $712; that the fair annual rent of the wharf was $750; and that between January and October 1855 portions of the wall continued to fall, and gravel and filling to wash away."

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Huntington, J. instructed the jury "that the plaintiff could only recover for such injuries as were the necessary, proximate and immediate consequence of the act complained of; and that the plaintiff would be bound to proceed to rebuild in a reasonable time, having regard to the season of the year and the nature of the work and all the attendant facts and circumstances; but that, inasmuch as there was evidence in the case tending to show that from the 1st of January 1855 to the time when he proceeded to rebuild he had from time to time, week to week, or very often, requested the defendants to repair the wall, and the defendants had as often promised they would; if the plaintiff was induced to delay, relying on these promises and undertakings, and it was through the defendants' fault that he did not rebuild, he might, in addition to the cost of rebuilding, recover for the loss of the use of the wharf, so far as it was the necessary and immediate consequence of the breach of duty by the defendants, for such period as he was induced to delay rebuilding by the promises, and neglect to fulfil such promises, on the part of the defendants; and the conduct and promises of the defendants were competent evidence to be weighed by the jury on the question of reasonable time."

The jury returned a verdict for the plaintiff for the sum of $1462, and the defendants alleged exceptions.

I. W. Richardson & G. H. Kingsbury, for the defendants. In the absence of any promise or undertaking on the part of the defendants to repair or rebuild the wharf, it would have been the duty of the plaintiff himself to repair it within a reasonable time after he found it defective; and he could have recovered of the defendants only such damages as, with reasonable endeavor and expense, he could not have prevented. *Loker* v. *Damon*, 17 Pick. 284. *Miller* v. *Mariner's Church*, 7 Greenl. 51. 2 Greenl. Ev. § 260. If by the defendants' promises to repair the wharf the plaintiff was induced to delay doing it himself, the defendants were liable for the increased expense of repairing, caused by such delay, it being the natural, proximate result of their own fault; but they were not liable for the loss of rent, because that depended on the plaintiff's contracts and

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engagements with other parties, and was a remote and speculative matter, depending on contingencies beyond the control of the defendants, and not contemplated by the terms of the contract. *Fox* v. *Harding*, 7 Cush. 516. *Waite* v. *Gilbert*, 10 Cush. 177. *Thompson* v. *Shattuck*, 2 Met. 615. *Blanchard* v. *Ely*, 21 Wend. 342. *Freeman* v. *Clute*, 3 Barb. 424. Sedgwick on Damages, (2d ed.) 37, 38.

H. F. Durant, for the plaintiff, cited *Fox* v. *Harding*, 7 Cush. 516; *Dickinson* v. *Boyle*, 17 Pick. 78; *The Narragansett*, 1 Blatchf. C. C. 211; *Clifford* v. *Richardson*, 18 Verm. 620; *Freeman* v. *Clute*, 3 Barb. 424; *Davis* v. *Talcott*, 14 Barb. 611; *Green* v. *Mann*, 11 Ill. 613; Sedgwick on Damages, 63; *Sewall's Falls Bridge* v. *Fisk*, 3 Foster, 171; *Waters* v. *Towers*, 8 Exch. 401; *Wilson* v. *York, Newcastle & Berwick Railway*, 18 Eng. Law & Eq. R. 557, note.

Thomas, J. The exceptions are now confined to a single point, the right of the plaintiff to recover damages for the loss of the use of the land. The case finds that the sea-wall or wharf was not built according to the contract; that it was defective; and that the defendants promised to rebuild it. The ordinary rule undoubtedly is, that the plaintiff must repair or rebuild the defective wall within a reasonable time, and that the expense of such repair or reconstruction, and the loss of the use of the land for such reasonable time would be the measure of damages. What was a reasonable time was to be determined in view of all the facts in the case. One material fact was that the defendants, admitting their failure to fulfil their contract, promised to rebuild, and the plaintiff relying, as he well might, upon such promises, delayed himself the rebuilding of the wall. The question was, whether the delay caused by the promises of the defendants, and their failure to keep them, could enter into the consideration of what was reasonable time. The presiding judge in the court below instructed the jury that they might take them into consideration. We think he was clearly right. Upon notice to the defendants of the defects in the structure of the wall, and the promise of the defendants to rebuild, the plaintiff might well wait and give the defendants

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the opportunity to perform their promise; and the delay so caused was as truly reasonable as that occasioned by the state of the season or other physical cause. Damages for the loss of the use of the land during such time are not remote, speculative or contingent, but the direct and immediate consequence of the defendants' failure to perform their contract and duty. The instructions to the jury were good law and good sense, clearly and accurately stated. *Exceptions overruled.*

AUGUSTUS ADAMS *vs.* DEXTER E. WADLEIGH.

In a deposition taken by commission objections to the form of interrogatories must be taken before the commission issues.

ACTION OF CONTRACT upon a promissory note. At the trial in the superior court of Suffolk at January term 1857, the defendant introduced in evidence a deposition taken by commission, to which the plaintiff then for the first time objected, because the interrogatories were leading, and because in one of them the defendant assumed a fact to have been stated in reply to a previous interrogatory, which the witness had not stated, and which had not been otherwise proved at the trial. *Huntington*, J. overruled the objection, and admitted the deposition. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. B. Robb, for the plaintiff.

E. F. Hodges, for the defendant.

DEWEY, J. The deposition of Boynton was properly admitted. The objections should have been specifically noted before the issuing of the commission. They go to the form of the interrogatories merely, and not to the competency of the evidence. *Allen* v. *Babcock*, 15 Pick. 56. *Potter* v. *Tyler*, 2 Met. 64. *Atlantic Mutual Fire Ins. Co.* v. *Fitzpatrick*, 2 Gray, 279.

Exceptions overruled.

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Asa Adams vs. Richard Barry.

It seems, that an action for injury to real estate of a wife may be maintained by her husband alone.

In an action of tort for obstructing a right of way, damages for the consequent diminution of rents cannot be recovered unless specially alleged in the declaration.

Action of tort for obstructing a right of way leading to an estate held by the plaintiff's wife in mortgage, "to the damage of the plaintiff, as he says, the sum of three hundred dollars;" which was the only allegation of damages. Trial and verdict for the plaintiff in the superior court of Suffolk at November term 1856, before *Abbott*, J., to whose rulings the defendant alleged exceptions, the substance of which appears in the opinion.

W. Brigham, for the defendant.

J. B. Robb, for the plaintiff.

Metcalf, J. At the argument of this case, the plaintiff, by consent of the defendant, exhibited evidence to the court, that the mortgage mentioned in the bill of exceptions had been foreclosed before this suit was commenced. We therefore need not inquire whether this action could have been maintained, if the mortgage had been outstanding. As the facts now appear, the plaintiff and his wife might have maintained the action, although the land described in the declaration was in the possession of tenants. *Cushing* v. *Adams*, 18 Pick. 110. It was also said in that case, that the plaintiff might have maintained the action, without joining the wife; that it was a case in which he might join her, or sue alone. And so are the decisions. *Allen* v. *Kingsbury*, 16 Pick. 235. 1 Roper on Husb. & Wife, 211. 2 Walford on Parties, 967 *& seq.*

But we are all of opinion that loss or diminution of rent was not, upon the declaration in this case, an element of damages, which the jury could legally take into consideration; and that, for this reason, the defendant is entitled to a new trial. The case comes within the decision in *Baldwin* v. *Western Railroad*, 4 Gray, 333, where it was held, upon great consideration, that under the practice act of 1852, *c.* 312, a general allegation of

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damages, in an action of tort, will not enable the plaintiff to prove special damages; that is, damages which the law does not imply from the facts alleged in the declaration. See also *Rising* v. *Granger*, 1 Mass. 49; *Warner* v. *Bacon*, 8 Gray, 400. In the present case, no damages for loss or diminution of rent can be implied by law, because such loss or diminution is not necessarily caused by the acts set forth in the declaration.

Exceptions sustained.

JAMES GORMAN & another *vs.* EMERSON WHEELER.

A factor, who takes a promissory note for goods sold on account of his consignor, and gives him reasonable notice of this and of the subsequent insolvency of the purchaser, does not, by proving the note under the insolvent laws and taking a dividend thereon, render himself liable for the full amount of the note, if he uses reasonable care and skill; although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency.

ACTION OF CONTRACT to recover the proceeds of goods received by the defendant in Boston as a commission merchant, and sold by him there on account of the plaintiffs, who were citizens of New York.

At the trial in the superior court of Suffolk at November term 1855, it appeared that the defendant sold the goods on a credit of sixty days to the firm of Blood & Bent, who were then in good credit, and took their promissory note for the price, payable to himself or order; that before the maturity of the note Blood & Bent failed, and took the benefit of the insolvent law of Massachusetts, and obtained their certificate of discharge, and the defendant proved the note under the proceedings in insolvency against their estate, and received a dividend of thirty per cent. thereon; that the defendant was largely in advance to the plaintiffs, and the plaintiffs owed him more than the amount of the note, when he proved the claim in insolvency; and that he subsequently rendered an account thereof to the plaintiffs, charging back the amount of sale and crediting the dividend received.

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The plaintiffs contended that the defendant by so proving the note had made himself liable therefor, unless he could prove that he was authorized by the plaintiffs so to do.

But *Nelson*, C. J. instructed the jury "that when the purchasers of the goods became insolvent after the sale, it became the duty of the defendant within a reasonable time to give notice of the transaction and of the insolvency to his consignors, the plaintiffs; that if, in giving such notice, he received any instructions, he was bound to follow them; but if he received no instructions, then he was bound to use all reasonable care and skill in managing the debt against the purchasers, for the best advantage of his consignors. He must not compromise the rights of the plaintiffs, if by the use of reasonable and proper care and skill he could avoid it; if he failed in these duties, then the plaintiffs could recover the amount of the sale. But if the defendant had taken the note according to the express direction of the plaintiffs, or had taken it, in the absence of any instructions, according to the usage of trade, and his principals, after notice, gave no instructions as to what course was to be pursued, the defendant could then prove the note in the ordinary course of proceedings in insolvency, and receive a dividend for the benefit of his principals, provided he in doing so acted with good faith, and with proper prudence, care and diligence for the best interests of his consignors; and the mere proof of the debt would not make him responsible for the amount." The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

H. J. Warner, for the plaintiffs, cited *Blackman* v. *Green*, 24 Verm. 17; Story on Agency, §§ 403, 413, 446; 2 Kent Com. (6th ed.) 623; *West Boylston Manuf. Co.* v. *Searle*, 15 Pick. 230.

H. F. Durant, for the defendant.

Thomas, J. The only point of the exceptions relied upon at the argument was to the instructions of the court below upon the power and right of the defendant to prove the debt in insolvency. The goods were properly sold upon credit; the note well taken in the name of the consignee; the consignee was greatly in advance to the consignors. The purchaser of the

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goods and maker of the note having gone into insolvency, what might and should the consignee do with this note against the insolvent?

The court below instructed the jury, in substance, that the consignee was bound to give notice to the consignors of the note and of the insolvency of the maker, and to follow any instructions he might receive from the consignors, but, if he failed to receive any, to use all reasonable care and skill in collecting the debt for the consignors, and if, acting in good faith and with prudence and care for the best interests of the consignors, he proved the note in insolvency, such proof would not make him responsible for the amount of the note.

Of these instructions the plaintiffs surely had no just ground of complaint. Whether they contract and abridge the rights of the defendant it is not necessary to determine. There could not well be an absolute rule that the consignee should or should not prove a claim like this in insolvency. The question as between him and the consignors must, it would seem, be always one of good faith and reasonable diligence in the collection of the debt.

A point was made in the argument, which does not appear to have been suggested at the trial, that as the consignors were citizens of another state, and the note was not in terms payable in this commonwealth, the debt, if not proved in insolvency, would not have been discharged. The place of payment of the note does not clearly appear by the bill of exceptions. But assuming that fact to be as stated, yet as upon failure to prove the debt there could be no dividend, the effect of the discharge was one only of the facts to be weighed in determining what due diligence in the collection of the debt required.

The case cited by the defendant, of *Blackman* v. *Green*, 24 Verm. 17, does not seem to us to conflict with the instructions given to the jury in the court below. The case proceeded upon the ground that no notice was given to the consignor, and no opportunity given to discharge the lien of the consignee upon the note. *Exceptions overruled.*

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Edward Houghton *vs.* John Wilson.

A constable who arrests a debtor on execution and commits him to jail, but leaves no copy of the execution with the jailer, who therefore refuses to receive and detain him, cannot arrest him again on the same execution.

Action of tort for assault, battery and false imprisonment. At the trial in the superior court of Suffolk at November term 1856, it appeared that the defendant, a constable of the city of Boston, arrested the plaintiff on a writ of execution, and took him to the jail, but that the jailer refused to receive and detain the plaintiff, because the defendant had delivered to him no copy of the process under which the plaintiff was arrested; and that subsequently the defendant again took the plaintiff to the jail and committed him. There was contradictory evidence whether the plaintiff went voluntarily to the jail with the defendant the second time to test the validity of the first arrest. *Abbott*, J. instructed the jury that if the second arrest and commitment were voluntarily submitted to by the plaintiff, he could not maintain the action; but that if the plaintiff, although not resisting the officer, went to the jail against his will, and did not intend to waive his right to exemption from the second arrest, he was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. L. Burt, for the defendant, cited *Appleby* v. *Clark*, 10 Mass. 59; *Brown* v. *Getchell*, 11 Mass. 13; *Gage* v. *Graffam*, 11 Mass. 183; *Little* v. *Newburyport Bank*, 14 Mass. 443; *Lansing* v. *Fleet*, 2 Johns. Cas. 3; 3 Steph. N. P. 2025; *Sheriff of Essex's case*, Hob. 202; *Buxton* v. *Home*, 1 Show. 174; *Ravenscroft* v. *Eyles*, 2 Wils. 295; *Trevillian* v. *Roberts*, 1 Rol. Ab. 307.

J. C. Park, for the plaintiff.

Dewey, J. The ruling that if the defendant had no legal right to make a second arrest of the plaintiff, and commit him to jail, yet if the arrest and commitment were voluntarily submitted to by the plaintiff, then he could not maintain the action,

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was sufficiently favorable to the defendant. But that defence failed upon the facts, as was found by the jury.

The case then stood thus: The defendant, as a constable, had arrested the plaintiff and taken him to jail, and omitted to leave with the jailer any copy of the process by which he had been arrested, and under which he was to be detained a prisoner. Under these circumstances, when the prisoner was permitted to go at large without any commitment, it was an escape from the constable and not from the jailer, although the jailer refused to receive and detain him. In point of fact, he had not received him, and the escape by being permitted to go at large was an escape from the custody of the constable. It was also a voluntary escape, and being such, the same officer could not again arrest him on the same execution. By making such second arrest he became a wrongdoer, and, having committed him wrongfully, was properly held responsible for the arrest and the detention by virtue thereof. *Exceptions overruled.*

HERBERT B. NEWHALL *vs.* ENOCH PAIGE & another.

The liability of a person who negligently receives goods not directed to him is the same as that of a bailee for hire or reward.

A contingent benefit is a sufficient consideration for undertaking a bailment.

ACTION OF CONTRACT, with a count in tort, to recover the value of merchandise sent from Portland, Maine, by steamboat to Boston, marked "H. B. Newhall, Saugus, care R. M. Morse, South Market St. Boston," and lost under the following circumstances: "Upon its arrival in Boston it was delivered to the teamster of the steamboat company, who took it to the defendant's store, where was the order box of an expressman who ran an express to Saugus. As this expressman did not run to that part of Saugus where the plaintiff lived, he told another expressman, George Towne, who kept a box in another part of

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the city, and went by the plaintiff's house, to call and take the merchandise. Towne called, paid the freight bill, and the defendants could not then find the merchandise. The only compensation received by the defendants for receiving and storing merchandise left for expressmen, and for allowing expressmen to have boxes in their store, was the advantage in bringing them business. The defendants kept a liquor store."

At the trial in the superior court of Suffolk at January term 1857 before *Huntington*, J., after proof of the above facts, the plaintiff asked the court to rule that this was a compensation sufficient to make the defendants bailees for hire; and that the defendants were strangers to the merchandise, inasmuch as it was improperly delivered to them, and could not excuse themselves from liability by proof of ordinary care and diligence; but that they were liable although there was no want of ordinary care on their part.

The court instructed the jury "that if the merchandise was received and delivered to be kept for hire or reward by the defendants, they would be bound to use ordinary care and prudence; that it was not necessary that the hire or reward should be for cash; that the storage might be taken for other consideration than money; but that it should be for some certain benefit, and not a mere contingent, uncertain and indirect benefit or expectation of benefit; that if the merchandise was delivered to the defendants on their voluntary undertaking to take care of it, without reward, their duty would be to exercise such care and prudence as they would use in their own affairs, and the plaintiff could not recover without proof of fraud or gross negligence; but that if the defendants were negligent in receiving goods not directed to them, in the manner stated in evidence, they would be bound to use ordinary care and prudence in the same degree as if they had received and kept them for hire or reward; and that the burden of proof was on them to show such care and diligence." The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

H. C. Hutchins, for the plaintiff.

J. C. Park, for the defendants.

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Bigelow, J. The only error in this case was in the instructions given to the jury, and consisted in telling them that the defendant could not be considered a bailee for hire unless his compensation was for some certain benefit to himself, and that a mere contingent, uncertain and indirect benefit would not constitute such a consideration as was necessary to establish a contract of bailment for hire or reward. This was stating the proposition more broadly than the rules of law will warrant. A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will not inquire into its sufficiency or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a *locatum* and not a *depositum*, and the defendants were liable for a want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may enure to the benefit of the party making the promise. *Haigh* v. *Brooks*, 10 Ad. & El. 320, and 2 P. & Dav. 484. *Lawrence* v. *McCalmont*, 2 How. 452. *Hubbard* v. *Coolidge*, 1 Met. 92. Where such a consideration exists, a contract cannot be said to be a *nudum pactum*, nor a bailment a gratuitous undertaking.

Exceptions sustained.

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William R. Carnes *vs.* John C. Nichols.

A person who has illegally detained goods, which the owner has since agreed to accept and send for, is not liable for their destruction by fire without his fault, after the owner has had a reasonable time to remove them.

Action of tort against a wharfinger for the conversion of fifteen sticks of mahogany, part of a lot of thirty two sticks purchased by the plaintiff of Grace, the consignee of the mahogany, while lying on the defendant's wharf. Trial and verdict for the plaintiff in the superior court of Suffolk at March term 1856, before *Nelson*, C. J., to whose rulings the defendant alleged exceptions. The facts appear in the opinion.

W. L. Burt, for the defendant.

G. O. Shattuck, (*P. W. Chandler* with him,) for the plaintiff, cited *Greenfield Bank* v. *Leavitt*, 17 Pick. 1, and *Curtis* v. *Ward*, 20 Conn. 204.

Thomas, J. This is an action of tort (trover) for the conversion of a lot of mahogany, the property of the plaintiff. Of the conversion of the property by the defendant no question seems to have been made. The plaintiff purchased the property of one Grace. He demanded it of the defendant. The defendant refused to deliver, and claimed to retain it till certain charges upon it were paid. What the charges were does not appear, but both parties assume that they were not valid. Grace, of whom the plaintiff purchased, arranged the matter as to the charges with the defendant, and the plaintiff was informed he could have the mahogany. He might have declined to take it, and have recovered of the defendant its value. He did not decline to take it. He directed a teamster to get the mahogany and carry it to his mill. The teamster went, on the same day, to the wharf, and took one load of seventeen sticks, selecting the smaller sticks for his convenience in the carrying of them. The defendant made no objection to the removal in such manner or times as the plaintiff saw fit. The teamster did not remove the remaining fifteen sticks of the mahogany, but delayed removing them, for reasons of his own convenience, till the

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afternoon of the next day, when they were destroyed by a fire which occurred without fault of the defendant. After the fire the plaintiff made a demand for the fifteen sticks destroyed by the fire. Upon these facts the defendant asked the court to instruct the jury as follows:

1st. "That if they were satisfied that the first detention of the mahogany for the alleged charges on it by the defendant was illegal, that was a conversion of the whole lot, and the plaintiff might have refused to receive any part of it afterwards, and the defendant would have been liable for the whole lot. But if the plaintiff afterwards was permitted by the defendant to receive, and thereupon directed his agent, the teamster, to go and get the whole lot, there being no arrangement or direction by the plaintiff that a part only should be taken, it was a return and acceptance of all that the plaintiff directed his agent to take and remove, and the defendant was entitled to have the value of that in mitigation of damages, unless the plaintiff was prevented by want of time, or circumstances beyond the plaintiff's control, from removing the whole."

2d. "That if they were satisfied that the first detention of the whole lot of mahogany by the defendant was illegal; but that, after the arrangement between the defendant and Grace, the plaintiff received, and directed his agent the teamster to remove the whole lot, there being no distinction made by the plaintiff or the defendant as to the part delivered and received; and the plaintiff proceeded thereupon to remove the mahogany, and did remove such part as he chose, and might have removed the whole, but left a part on the defendant's wharf for his own convenience, whereby such remaining part was destroyed by an accident without any fault of the defendant; the defendant was entitled to have deducted from the damages for the first conversion the full value of the mahogany at the time of its redelivery to the plaintiff, and acceptance by him, although it still remained on the defendant's wharf, and was eventually lost by the plaintiff."

We think the instructions prayed for correctly stated the law of the case. The mahogany returned to the legal possession and

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control of the plaintiff. If reasonable time had not intervened to remove the mahogany before the fire, the defendant might possibly have been liable for its full value. But if reasonable time for removal did intervene — and of this there can be, we think, no doubt — the plaintiff's only claim for damages would be for the detention of the goods, or other injury, before he resumed the control over them. *Exceptions sustained.*

HUMPHREY HOYT & another *vs.* JOHN P. ROBINSON.

On *scire facias* against a trustee in foreign attachment, the defendant cannot avail himself for the first time of the objection that the money in his hands is due from him jointly with another person, upon whom no service was made, although he was named in the original writ; even if the money has since been attached by another person.

SCIRE FACIAS against the defendant as trustee of Jonathan Smith. The defendant, who had not answered the original writ, now answered that at the time of the service of that writ on him he had not individually any goods, effects or credits of Smith in his hands or possession; that there was a certain sum due to Smith from the firm of Kimball & Robinson, composed of Aaron Kimball and this defendant, but no service was made on Kimball, although residing in the Commonwealth and named as a trustee in the original writ; and that since the service of that writ, Charles H. Carroll had commenced an action against Smith and summoned Kimball & Robinson as trustees, which had been duly entered in court, and in which the partnership had duly appeared and answered.

The superior court of Suffolk gave judgment for the defendant, on payment of costs, and the plaintiffs appealed.

H. C. Hutchins, for the plaintiffs, cited *Parker* v. *Danforth*, 16 Mass. 303; *Sigourney* v. *Stockwell*, 4 Met. 518; *Wilcox* v. *Mills*, 4 Mass. 218; Cush. Tr. Pro. §§ 93, 355; *Springfield Card Manuf. Co.* v. *West*, 1 Cush. 388; *Hall* v. *Young*, 3 Pick. 80; Rev. Sts. *c.* 109, § 41.

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A. H. Fiske, for the defendant. The defendant must be discharged:

1st. Because, in order to make an effectual attachment of the property of a debtor in the hands of a partnership, all the partners residing in this commonwealth must be summoned as trustees. *Jewett* v. *Bacon*, 6 Mass. 62. *Kidder* v. *Packard*, 13 Mass. 80. *Parker* v. *Danforth*, 16 Mass. 302. *Nash* v. *Brophy*, 13 Met. 476. *Warren* v. *Perkins*, 8 Cush. 518. *Rix* v. *Elliot*, 1 N. H. 184. In *Hathaway* v. *Russell*, 16 Mass. 473, the persons summoned as trustees, or who owed the debt intended to be attached, were not partners, and did not owe the debt as partners; but were tenants in common of a shop. If they are to be deemed partners, that case has been overruled by the subsequent decisions, or the law has been changed. Rev. Sts. *c.* 109, § 41.

2d. Because the rights of another party have intervened, the validity of whose attachment cannot depend upon the trustee in the former suit appearing at the return term of the writ or pleading in abatement. The plea or answer in abatement is taken away by the practice act. *St.* 1852, *c.* 312, § 56.

Bigelow, J. The objection that the trustee could not be held liable for the money in his hands belonging to the principal defendant in the original action, because it was not due from him alone, but from himself and his copartner jointly, would have been valid, if seasonably taken. *Jewett* v. *Bacon*, 6 Mass. 60. *Nash* v. *Brophy*, 13 Met. 476. *Warren* v. *Perkins*, 8 Cush. 518.

But the omission to summon a joint contractor as trustee is properly matter in abatement, and if the person summoned as trustee desires to avoid the process on this ground, he must avail himself of the objection in answer to the original process. He cannot do it on the *scire facias*. This was distinctly adjudicated in *Hathaway* v. *Russell*, 16 Mass. 474. The provision in the Rev. Sts. *c.* 109, § 41, that a trustee shall be permitted on *scire facias* to plead and prove any matter that may be necessary or proper for his defence in the suit on the *scire facias*, was not intended to open the door for the trustee to plead matters in abatement to the original suit Such

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matters are neither necessary nor proper to the defence of the suit on the *scire facias*. Being technical and dilatory in their nature, they must, on the well settled principles of the law be insisted on in an early stage of the case. *Pratt* v. *Sanger*, 4 Gray, 88. All matters which properly go to the merits of the suit against the trustees can be availed of in defence to the *scire facias* under the provisions of the statute above cited. But the original suit and the *scire facias* under the trustee process constitute only one continued and connected course of proceedings; and it would be a violation of principle to permit a technical defence, like the nonjoinder of a co-contractor with the person summoned as trustee, to prevail, when it was not pleaded until the last stage in the proceedings had been nearly reached.

It does not appear that the trustee has changed his situation, or in any way suffered by the omission to summon his copartner to answer in the suit. The commencement of another suit subsequently to the original action in this case, in which the members of the copartnership are duly summoned as trustees, cannot affect the liability of the trustee in this action. Being legally chargeable as trustee in this suit, he cannot be held liable in another action for the money which he has been compelled to pay on execution issued in this one. *Trustee charged.*

SAMUEL D. GREENWOOD *vs.* LAKE SHORE RAILROAD COMPANY.

The incorporation of defendants sued as a corporation may be denied after they have appeared generally and filed an affidavit of merits.

IN an action of tort the defendants, alleged in the writ to be a foreign corporation, after filing an affidavit of merits, answered, denying their legal incorporation.

By the officer's return, it appeared that service was made upon the supposed agent of the defendants, and a chip attached as their property.

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At the trial in the superior court of Suffolk at November term 1856, the defendants requested the court to rule, that the plaintiff must first produce and prove the act of incorporation of the defendants, and objected to other evidence being put in before such proof; and contended that the plaintiff could not maintain his action without it. But *Abbott*, J. ruled "that a general appearance and filing an affidavit of merits was sufficient, without proving the act of incorporation; and that after such appearance and affidavit of merits the defendants could not in this action deny that they were a corporation." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. H. Bradley, for the defendants, cited *Middlesex Husbandmen & Manufacturers* v. *Davis*, 3 Met. 137; *Narragansett Bank* v. *Atlantic Silk Co.* 3 Met. 288; *Townsend* v. *Baptist Church in Lowell*, 6 Cush. 281, & cases cited; *Whitmore* v. *Congregational Society in Plymouth*, 2 Gray, 306; *Benthall* v. *Hildreth*, 2 Gray, 288; Gould Pl. *c.* 5, § 138.

H. F. Durant, for the plaintiff. The defendants, by appearing generally by attorney as a corporation, and as such filing an affidavit of defence upon the merits, and answering on the merits, have admitted that they are a corporation, and cannot afterwards say that they are not, or call upon the plaintiff to prove that they are. *Gilbert* v. *Nantucket Bank*, 5 Mass. 97. *Stone* v. *East Berkshire Congregational Society*, 14 Verm. 86. 1 Kyd on Corp. 285.

Dewey, J. The ruling of the superior court, that after an entry of a general appearance on the docket, and the filing of an affidavit of merits, or in the language of the statute, (*St.* 1852, *c.* 312,) that the party "verily believes that the defendants have a substantial defence to the action on its merits," it was not competent for the defendants in their answer to deny that they were a legal corporation and raise that issue, was erroneous. Such defence was open to the defendants, and was properly raised in their answer. The entry of a general appearance operated as a waiver of all objections to the want of a proper service of the writ upon the defendants, but did not affect the defence upon the merits. *Exceptions sustained.*

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Lotan Gassett *vs.* Jonathan Cottle.

After judgment has been rendered in the superior court, and exceptions allowed, though not entered in this court, the superior court cannot enter final judgment; but the original judgment may be affirmed by this court on complaint under the Rev. Sts. c. 82, § 14.

Replevin. At January term 1856 of the superior court of Suffolk, the defendant obtained a verdict, and a judgment for the return of the goods replevied, and the plaintiff alleged exceptions to the rulings of the court, and the case was continued until November term 1856, when his exceptions were allowed. At January term 1857, on motion of the defendant, the former judgment was vacated and the case brought forward and judgment entered as of that term. The plaintiff appealed to this court.

W. L. Burt, for the plaintiff.

G. E. Betton, for the defendant.

Dewey, J. The judgment of the superior court, rendered at January term 1857, which is now made the subject of an appeal for error in matter of law apparent on the record, cannot properly be affirmed. Upon inspection of the record of the proceedings in this case, it appears that at November term 1856 exceptions to the ruling of the presiding judge on the trial of the case, having been previously duly filed by the counsel, were allowed and signed by the judge. This having been done, the case was thereby removed from the further action of the superior court, and the proceedings were to be before this court; either upon a hearing upon the bill of exceptions, if duly entered; or by affirmation of the judgment of the court below, upon complaint duly filed by the other party, if the party taking the exceptions failed to enter the same. Rev. Sts. c. 82, §§ 12–14. In this state of the case, the proceedings of the superior court at January term 1857 were unauthorized, that court having no further jurisdiction in the case. The result is therefore that the judgment then rendered was erroneous, and must be reversed for that cause

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Under Rev. Sts. *c.* 81, §§ 34, 35, and *c.* 82, § 14, it will be still open to the party to apply for further proceedings, by way of petition to enter a complaint for an affirmance of the judgment of a former term, in reference to which the exceptions were filed and allowed. *Judgment of January term* 1857 *reversed.*

Upon a subsequent complaint of the defendant, praying for the entry of the action in this court, and the affirmation of the judgment rendered by the superior court at November term 1856, that judgment was affirmed, the defendant taking no costs since January term 1856.

Betton, for the defendant.

J. A. Andrew & Burt, for the plaintiff.

ENSIGN B. ROGERS *vs.* GEORGE H. SAWIN.
SAME *vs.* SAME.

By the law of Massachusetts, before *St.* 1852, *c.* 144, the mere uninterrupted continuance for more than twenty years of a window with a projecting sill, overlooking the land of another, did not necessarily create any easement of light or air.

ACTIONS OF TORT for entirely darkening, by building and continuing a wall, an ancient window in a house in Boston, to which the plaintiff alleged the light and air should of right come free and unobstructed. The answer denied the plaintiff's right.

At the trial in the superior court of Suffolk at January term 1857, before *Huntington*, J., the plaintiff introduced evidence that he held the estate by lease from the owner; that the window in question, which was in the fourth story of the house, had existed uninterruptedly from the year 1829 until the autumn of 1855, free and unobstructed, and then the defendant, in rebuilding his house, built his wall directly against the window in question; that the sill of the window projected over the defendant's land so much that it was cut off by the builders

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when the defendant built the wall complained of; and that the title of the two estates had not been in the same person since 1826.

The plaintiff asked the court to instruct the jury that the free and unobstructed use of the window for more than twenty years prior to 1852, without interruption, especially if the sill of the window projected over the defendant's land, constituted an adverse use or enjoyment, the title of the two estates having been in different persons during that time.

But the court instructed the jury "that the mere open and unobstructed use of the window for light and air for more than twenty years prior to 1852 without interruption, either with or without the existence of the sill and the state of the title, did not necessarily constitute an adverse enjoyment, so as to enable the plaintiff to recover; that the word 'adverse' meant that the plaintiff's use must be under a claim of right, with the knowledge of the owner, and not with his permission; that the plaintiff must have exercised some right, conflicting with that of the defendant, other and farther than the mere ordinary use of the window for the admission of light and air; that the use must work some wrong, or must deprive the defendant of some beneficial right; that the existence of the sill was a fact tending to show that the plaintiff claimed the use of the window adversely to the defendant, and proper for the jury to consider with the other evidence in the case; that, in considering the same, they might well take into view the position of the sill and the opportunities the defendant had of knowing of its existence; and, by way of illustration, stated that more weight might perhaps be due to the fact that such a sill existed, if it was near the ground in a frequent passageway and in full view, than if it was very high up in the fourth story of the plaintiff's house and over the defendant's roof."

The jury found a verdict for the defendant, and the plaintiff alleged exceptions.

J. G. King, for the plaintiff, cited *Lewis* v. *Price*, 2 Saund. 175, note; *Cross* v. *Lewis*, 2 B. & C. 686; *Moore* v. *Rawson*, 3 B. & C. 332; *Tyler* v. *Wilkinson*, 4 Mason, 402; *Hazard* v.

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Robinson, 3 Mason, 272; *Mahan* v. *Brown*, 13 Wend. 261; *Renshaw* v. *Bean*, 18 Ad. & El. N. R. 112; *Banks* v. *American Tract Society*, 4 Sandf. Ch. 464; *Robeson* v. *Pittenger*, 1 Green Ch. 57; *Manier* v. *Myers*, 4 B. Monr. 520; *McCready* v. *Thomson*, Dudley (S. C.) 131; *Gerber* v. *Grabel*, 16 Ill. 217; *Atkins* v. *Chilson*, 8 Met. 403; *St.* 1824, *c.* 52; Rev. Sts. *c.* 60, § 27, & commissioners' note; *St.* 1852, *c.* 144.

E. D. Sohier, for the defendant, cited 3 Kent Com. (6th ed.) 448; *Bury* v. *Pope*, Cro. Eliz. 118; *Parker* v. *Foote*, 19 Wend. 309; *Pierre* v. *Fernald*, 26 Maine, 436; *Myers* v. *Gemmel*, 10 Barb. 537; *Napier* v. *Bulwinkle*, 5 Rich. 311; *Ingraham* v. *Hutchinson*, 2 Conn. 584; *Gerber* v. *Grabel*, 16 Ill. 217; *Fifty Associates* v. *Tudor*, 6 Gray, 255; *Sargent* v. *Ballard*, 9 Pick. 251; *Daniel* v. *North*, 11 East, 371.

Metcalf, J. It is enacted by *St.* 1852, *c.* 144, that "no person, who has erected or may erect any house or other building near the land of any other person, with windows overlooking such land of such other person, shall by mere continuance of such windows acquire any easements of light or air, so as to prevent such other person, and those claiming under him, from erecting any building on such land." The question in the present cases has, by this statute, ceased to be of practical importance in any future case. We shall therefore omit such a discussion of that question, as we might otherwise have deemed advisable.

By the English common law, as shown by the authorities cited by Mr. King, the open and uninterrupted use, by the plaintiff, of the window in question, for more than twenty years before the *St.* of 1852 took effect, constituted, or was at least *prima facie* evidence of, such an adverse possession and use thereof, as entitled him to an easement of light and air, and to an action for an interruption of such easement by the defendant; and this, upon the ground that such uninterrupted use and possession would warrant, if not require, a jury to find a grant from the defendant, or from those under whom he claims, of a right to such possession and use. Is this the common law of Massachusetts? We think not, and for the reasons given in the

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American decisions cited by Mr. Sohier, and the additional case of *Cherry* v. *Stein*, 11 Maryland, 23. The case of *Pierre* v. *Fernald*, 26 Maine, 436, satisfactorily answers the plaintiff's argument drawn from the Rev. Sts. *c.* 60, §§ 27, 28.

The short grounds of the decisions cited are, 1st. That the making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encroachment on his neighbor's rights, and therefore cannot be regarded as adverse to him: 2d. That the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages. And we may add, that even by the English law, before *St.* 2 & 3 W. 4, *c.* 71, was passed, the defendant might lawfully have done in the city of London what he has done in Boston. *Hughes* v. *Keene*, Calthrop, 41. *Anon.* Com. R. 273. *Truscott* v. *Wardens of Merchant Tailors' Co.* 11 Exch. 855. The plaintiff has no ground of exception to the instructions given to the jury.

Exceptions overruled.[*]

RUFUS B. BRADFORD & another *vs.* ATHERTON H. STEVENS.

Under the *St.* of 1852, *c.* 322, § 14, intoxicating liquors might be sold by any person, though not himself the importer, in the original unbroken packages in which they were imported, and in quantities not less than those prescribed by the laws of the United States.

In a book of original entry, entries of sales, begun by another person, but finished and the quantities and prices entered by the clerk producing them, are admissible in evidence of the sales, although he has no independent recollection on the subject; and copies of these entries, made by another in a second book, and verified by the witness, are also admissible, in connection with the first book.

In an action in which an auditor's report had been produced in evidence by the plaintiff, the judge instructed the jury that the burden of proof was upon the plaintiff, and was not satisfied by the auditor's report; that this was *prima facie* evidence, but might be rebutted by the defendant; that, if not rebutted, the verdict should be for the plaintiff, but if on the whole testimony there was a preponderance of evidence in favor of the defendant, the verdict should be for him. *Held*, that the defendant had no ground of exception.

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[*] See *Carrig* v. *Dee*, 14 Gray, 583; *Radcliff* v. *Mayor &c. of Brooklyn*, 4 Comst. 200; *Lampman* v. *Milks*, 21 N. Y. 511; *Haverstick* v. *Sipe*, 33 Penn. State R. 368; *Webb* v. *Bird*, 10 C. B. N. S. 285, 286, and 8 Jur. N. S. 621

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ACTION OF CONTRACT upon an account annexed. The case was referred to an auditor, who allowed certain items of intoxicating liquors, not imported by the plaintiffs, but purchased by them of the importers in the original, unbroken packages, and in quantities not less than the laws of the United States prescribed; and sold by them to the defendant in this state, without any license, after the passage of the *St.* of 1852, *c.* 322, and before the passage of the *St.* of 1855, *c.* 215, in the same packages and condition in all respects in which they had been imported.

At the trial in the superior court of Suffolk at May term 1856, before *Nash*, J., the plaintiffs offered the auditor's report in evidence. The defendant contended that the plaintiffs could not recover the price of these liquors. But the judge ruled otherwise.

A clerk of the plaintiffs testified before the auditor that he sold and delivered to the defendant several of the articles charged in the plaintiffs' account, and at the same time made entries of their weights and measures in a book kept for that purpose, which he produced, and which contained marks denoting their delivery; that he knew his entries to have been accurately and truly made; but had no recollection, independently of the book, of the times of sale, or the quantities and prices of the articles sold. He also testified that in one instance, in his absence, the defendant's name was entered on the same book as having ordered certain articles; that he took the book and put up the articles, and entered their weights and measures upon the book; that those articles with their weights and measures were transferred, but not by the witness, from that book into the plaintiffs' day book to the debit of the defendant; and after their entry in the day book the witness delivered those articles to the defendant, and made a mark against them on the day book indicating such delivery.

The defendant objected to the admission of the clerk's testimony and the books, and of the auditor's report founded thereon, because the clerk had no independent recollection of the facts; because the book was not the plaintiffs' book of original entry; and because the entries of one transaction were made by an-

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other clerk. But the judge, upon examination of the two books was satisfied as matter of fact that the first book was the plaintiffs' book of original entries of charges, and that in the instance last mentioned the entries, although begun in the handwriting of another person, were finished, and the quantities, prices, weights and measures entered, by the witness; and was of opinion that the entries were therefore substantially made by him, and that these entries having afterwards been copied into the day book by another clerk, and certain marks, called "delivery marks," affixed to them by the witness, that book was also admissible in connection with the first book.

The judge further instructed the jury that the burden of proof was upon the plaintiffs and was not satisfied by the auditor's report which had been produced in evidence; that this was *prima facie* evidence of the plaintiffs' claim, but might be rebutted by evidence adduced by the defendant; that if not rebutted, the verdict should be for the plaintiffs; and that if on the whole testimony there was a preponderance of evidence in favor of the defendant, the verdict should be for him.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

E. Ripley, for the defendant.

G. H. Preston, for the plaintiffs.

Bigelow, J. The clear implication of *St.* 1852, *c.* 322, § 14, is, that liquors imported regularly under the laws of the United States, and contained in the original packages, are not intended to be included within the prohibition and restraints enacted in that statute. The defendant was therefore liable for the price of those articles which were proved to have been in the original and unbroken packages in which they were imported, in quantities not less than those prescribed by the laws of the United States. The "owner and possessor" of such liquors, and not the importer only, is entitled to the immunity contemplated by the provisions of that section of the statute. It is otherwise under the *St.* of 1855, *c.* 215, which, by § 2, exempts from the penalties therein provided the importer of foreign liquors only, and not those holding the original package by purchase under him.

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Upon the facts found by the court concerning the books used before the auditor, we think they were properly admitted in evidence; and that the report of the auditor was submitted to the jury with appropriate comments, to which no valid objection can be taken. *Exceptions overruled.*

HENRY A. WINSHIP & another *vs.* ALONZO F. NEALE.

It is no ground of exception, that a party was allowed to ask a counsellor at law, on cross-examination, whether he had not filed interrogatories to him in behalf of the other party, and obtained a continuance of the action at the last term, and refused a continuance at this term, because the parties themselves would be made competent witnesses by statute before the next term.

An action of tort for taking and carrying away and converting to the defendant's use goods of the plaintiff cannot be maintained without proof of the plaintiff's possession, or right to an immediate possession.

ACTION OF TORT. The declaration alleged that "the defendant took and carried away the following described goods, the property of the plaintiffs, and converted them to his own use, all of which being against the plaintiffs' will and consent." A schedule of the property was annexed to the declaration.

At the trial in the superior court of Suffolk at May term 1856, before *Huntington*, J., the plaintiffs introduced evidence tending to show that the goods were theirs, and had been consigned by them to John G. Haley, and taken by the defendant as a deputy sheriff on mesne process against Haley.

A counsellor at law, and former counsel for the defendant, was permitted, against the plaintiffs' objection, to testify; and upon cross-examination, the plaintiffs, in order to show the state of feeling and circumstances under which he testified, were allowed to ask him whether he had not filed interrogatories to the plaintiffs, and obtained a continuance of the case at the last term, and refused a continuance at the present term, after ascertaining what the plaintiffs' witnesses would testify upon a point testified of by him, solely because the plaintiffs themselves would be competent witnesses at the next term.

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The defendant's counsel contended that "the plaintiffs had not, at the time of taking by the defendant, the possession of the articles sued for, nor the right to immediate possession, and could not therefore, if the jury found such to be the fact, upon the pleadings as they stood, maintain this action. But the court instructed the jury that "although such was the law before the new practice act, it was not so now; and that it was not necessary for the plaintiffs to have actual possession, or the right to immediate possession, if the jury were satisfied that they were the owners at the time of the taking; but that the jury would deduct the value of the use, during the time they were not in possession, from the value at the time of the taking." The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

A. A. Ranney, for the defendant.

D. H. Mason, for the plaintiffs.

Bigelow, *J.* 1. The extent to which the cross-examination of the witness should be carried was within the discretion of the judge who presided at the trial, and no exception lies to the mode of its exercise.

2. But the ruling of the court was erroneous in one particular. The cause of action set out in the declaration was either in the nature of trespass for wrongfully taking goods belonging to the plaintiffs, or of trover for converting them. In either case, it was necessary to show possession, or a right to immediate possession; otherwise, the evidence would fail to support the essential allegations in the declaration. The practice act makes no change in the rules of evidence applicable to the various causes of action comprehended under the general designation of actions of tort. *Robinson* v. *Austin*, 2 Gray, 564. The ruling of the court would have been correct, if the declaration had been for the wrongful act of the defendant in depriving the plaintiffs of their reversionary right or ownership in the property, subject to the special right or interest of Haley therein; but it was erroneous as applied to the cause of action set out in the declaration. *Exceptions sustained.*

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Boston and Maine Railroad *vs.* Joseph H Bartlett & another.

Specific performance of an agreement to convey land to a railroad corporation will not be decreed on a bill in equity filed by them more than three years after the other party has refused to perform it, and after they have located their road over other land including but a small portion of this, and after this land has greatly increased in value, without any steps taken by the corporation meantime to enforce the agreement.

Bill in equity, filed June 13th 1847, for the specific performance of the following agreement, signed by the defendants, and renewed by them in writing on the 30th of April 1844 for thirty days: "To the President and Directors of the Boston and Maine Railroad. Gentlemen, We the undersigned being the owners of a lot of land on the Mill Creek, we do hereby agree to sell the same to you or your representatives, for the sum of twenty thousand dollars, if taken within thirty days from date. Boston, April 1st 1844."

The plaintiffs on the 29th of May 1844 orally accepted the proposition, tendered the purchase money to the defendants, and requested a conveyance; but the defendants, in consequence of a dispute, which had arisen between the parties, whether the buildings upon the land were included in the agreement, refused to execute a conveyance of the land or to perform the contract.

The plaintiffs afterwards located their road, and included in the location a small portion of this land; and on the 7th of June 1847 the defendants petitioned the mayor and aldermen of Boston to assess damages for the land so taken.

The defendants introduced testimony that the land greatly increased in value between the 29th of May 1844 and the 13th of June 1847, in consequence of the construction of the railroads of the plaintiffs and the Fitchburg Railroad Corporation, and of a great fire which destroyed many old buildings in that neighborhood.

The case was argued upon the bill, answer and proofs, from which it appeared to be as above stated.

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R. Choate & C. P. Judd, for the plaintiffs. The plaintiffs are entitled to a specific performance. It is admitted that the contract is certain and definite, fair and reasonable, and that the plaintiffs have made a sufficient offer to perform it on their part.

The plaintiffs have not abandoned the contract. *Remington* v. *Irwin*, 14 Penn. State R. 143. *Tiernon* v. *Roland*, 15 Penn. State R. 441. *Reynolds* v. *Nelson*, Mad. & Geld. 18. *Robinson* v. *Page*, 3 Russ. 119.

The delay in bringing the bill was no abandonment. It was filed as soon as the defendants filed their petition for damages. In this respect the case falls directly within *Western Railroad* v. *Babcock*, 6 Met. 346. Rise in value of the land is very difficult to be established, and there is no case in which this of itself has been deemed ground for defeating such a bill. See 6 Met. 357. And the rise is due to acts which were in contemplation of the parties at the time of the agreement.

B. R. Curtis & H. C. Hutchins, (*J. P. Healy* with them,) for the defendants.

By the Court. A bill for the specific performance of a contract cannot be maintained as matter of strict right in every case in which a contract, valid in law, has been broken. It is an application to the discretion of the court, to its judicial discretion, guided by established principles. Any delay which shows that the party has not used reasonable diligence in applying for the aid of a court of equity will lead the court to refuse specific performance. 1 Sugd. Vend. (11th ed.) 235, 288. *Millward* v. *Thanet*, 5 Ves. 720 note. *Southcomb* v. *Exeter*, 6 Hare, 219–224, & note, & cases cited.

When this case was before us upon a demurrer to the bill, the only ground upon which the defendants insisted was, that their agreement was without consideration; and that was held to be no sufficient objection to the maintenance of the bill. 3 Cush. 224. But the case is now more fully exhibited to the court, and shows that the plaintiffs have been guilty of great laches. The contract for the sale of the land was made in April 1844. The plaintiffs performed their part of the contract on the 29th of May of the same year, and the defendants then dis

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tinctly and absolutely refused to perform it on their part. No bill was filed for more than three years after the final refusal of the defendants to perform the contract, and this long delay in applying for the enforcement of the contract is left by the plaintiffs entirely unexplained. These facts would of themselves make us hesitate to give the plaintiffs the equitable relief which they seek. *Walker* v. *Jeffreys*, 1 Hare, 348, & cases cited. *Rogers* v. *Saunders*, 16 Maine, 92.

But there are other circumstances which tend to show that it would be inequitable to grant the relief asked for. The fact that the land which was the subject of the contract had greatly increased in value after the refusal to perform the contract and before the filing of this bill is entitled to some weight. *Holt* v. *Rogers*, 8 Pet. 434. The plaintiffs, having signed no agreement, could never have been compelled by the defendants to take the land. *Jacobs* v. *Peterborough & Shirley Railroad*, 8 Cush. 223. If the plaintiffs had themselves brought their action at law, the limit of their damages would have been the difference between the contract price and the value of the land at the time of the breach. *Old Colony Railroad* v. *Evans*, 6 Gray, 25. The location of the plaintiffs' road over a small portion only of this land, under the power conferred upon them by their charter, also indicated their intention to abandon this contract, or at least does not exhibit any intention to rely upon it. In the case of *Western Railroad* v. *Babcock*, 6 Met. 346, cited by the plaintiffs, there never had been any doubt that the plaintiffs intended to rely on the agreement, and they had located and constructed their railroad accordingly.

Having thus by their acts and laches for three years induced the other party to suppose that they have abandoned this contract, it is too late to apply to this court to enforce it.

Bill dismissed, without costs.

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Black River Savings Bank *vs.* John F. Edwards.
Same *vs.* Same.
Same *vs.* Same.

In an action upon a promissory note, the consideration of which was denied by the defendant, the judge instructed the jury that the burden was on the plaintiff to establish a consideration, and did not shift upon the defendant; that the note, containing the words "value received," in law imported a consideration, and upon the evidence of the note itself the plaintiff would be entitled to recover, unless there was some other evidence to affect it; yet the burden was upon the plaintiff to satisfy the jury upon all the evidence and by the preponderance of evidence that there was a consideration; that if the jury could not say upon all the evidence whether the testimony introduced was true, or so much was true as to affect the credit to be given to the note, the note would enable the plaintiff to recover; and that if the defendant did not himself receive the consideration, the note was still *prima facie* evidence of a consideration. *Held*, that the defendant had no ground of exception.

In an action by a corporation upon a promissory note payable to them and received by their treasurer, the judge refused to instruct the jury that to constitute a consideration it must be shown that the defendant had some value therefor, or that the plaintiffs, at the time of making it, intentionally, and as the consideration of the note, and at the defendant's request, agreed to do or did some act believed to be prejudicial to themselves; and also refused to instruct the jury that, as the plaintiffs adopted the note, they adopted it in all respects, according to the understanding and agreement of their treasurer and the defendant, and affected by the knowledge of all the facts known to them, and if as between them it was without value and for the accommodation of the plaintiffs, then, whatever uses their treasurer made or intended to make of it, the plaintiffs could not recover; and instructed the jury that if the plaintiffs received some prejudice, at the request or procurement of the defendant, it was a sufficient consideration; and that if the defendant and the treasurer knew that the object of the note was to deceive the plaintiffs, or to obtain money for the treasurer from them, that was enough to create a consideration, if the money was obtained upon it accordingly from the plaintiffs. *Held*, that the defendant had no ground of exception.

In an action upon a promissory note payable to a bank, the jury were instructed that if no money was had by the defendant on the note, and yet it was given by him to the plaintiffs' treasurer to aid him in getting money from the bank, and in concealing the condition of the bank, or to aid in any illegal transaction, or with reasonable cause to know that it would be so illegally used, and the money was accordingly obtained by the treasurer from the bank, the defendant would be estopped, because this would constitute no defence to the note, he being estopped to allege his own fraud. *Held*, that upon the facts supposed there would be no defence; and that the statement that the defendant would be estopped was immaterial.

A judgment for the plaintiff in an action to recover an instalment of interest on a promissory note, in defence to which want of consideration is relied on, is conclusive evidence of consideration in a subsequent action between the same parties to recover the principal of the note.

Actions of contract upon the following note: "Boston, Mass. October 1, 1853. $14,000. For value received I promise

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to pay to the Black River Savings Bank or order fourteen thousand dollars, as follows: four thousand dollars in two years from date, and ten thousand dollars in three years from date, with interest at the rate of six per cent. per annum, payable on the first day of April and October of each year until paid, having deposited with said bank, as collateral security, twenty thousand dollars in the second mortgage bonds of the Ogdens burg Railroad, with interest coupons attached thereto, with full authority to sell the same on the nonpayment of principal or interest according to the tenor of the above note.

"John F. Edwards."

The *first* action was brought to recover the interest from October 1st 1854 to April 1st 1855, and was tried in the superior court of Suffolk at September term 1856, before *Nelson*, C. J.

The defendant admitted the making of the note, but alleged that it was made without consideration, at the request and for the accommodation of the plaintiffs. The plaintiffs, having produced the note, and proved their own corporate existence, rested their case.

The defendant then called a broker, who testified that between October 8th 1852 and April 12th 1853 he purchased in Boston for and at the request of Daniel A. Heald, who was at that time the treasurer and secretary of the plaintiffs, the mortgage bonds described in the note in suit; that the defendant had nothing to do with giving the orders or making the payments for these bonds, and he never knew the defendant in any way in the transactions.

Heald and the defendant testified that the defendant, who was Heald's uncle, had no consideration for the note, and no interest in the bonds.

It appeared from the testimony of Heald and other witnesses, that the note in suit was placed in the Savings Bank to represent a loan of $14,000 of the deposit of the bank; was so entered upon the books of the bank; and was so taken and received by the finance committee, trustees and other officers of the bank, and was so constantly represented by Heald to the bank and its depositors, and so held by the bank and its offi-

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cers; and that deposits were made upon those representations and facts.

But Heald testified that this was not the truth of the case, but that the note was obtained by him in behalf and for the accommodation of the bank, and the bonds were previously purchased for the bank, with its money, and the note placed in the bank with the bonds, to give the transaction the form and semblance of a loan; that his object in procuring the note was, that the bank might not appear to be holding such an amount of bonds, except as collateral; that he thought it a safe and good investment for the bank; but did not wish that the trustees, and through them, the public, should know it. This testimony of Heald was contradicted by evidence of his own entries and declarations and official statements under oath.

Edwards testified that he signed the note at the request of Heald, without any explanation, except this remark made to him by Heald some months previously, "We may want to use your name for a short time;" and stated on cross-examination, "that when he gave the note, he did not know or think of, and that he did not now know or think of, and could not suggest, any lawful or honest purpose for which the note was wanted, or to which it could be applied, if not given to the bank for a loan of money; but that he did not know or think of any dishonest or unlawful purpose to which it was to be applied."

The plaintiffs controverted the credibility of the defendant and Heald; and the questions of their credibility, and of the effect of their testimony, were submitted to the jury with the other evidence.

The defendant's counsel prayed the court to give the following instructions to the jury:

1st. "To recover on the note in suit, the plaintiffs must prov that it was given upon a consideration good and sufficient in law; on this point the burden of proof is upon the plaintiffs; and unless they have, by the weight and preponderance of evidence, established such consideration, they cannot maintain their action."

2d "To constitute such consideration, it must be shown that

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the defendant had some value therefor, as money lent him, or the like; something of value, and agreed by the parties to be and to be deemed and taken as of value; or that the plaintiffs, at the time of making it, intentionally, and as the consideration of the note, and at the defendant's request, agreed to do or did some act believed to be prejudicial to themselves."

3d. "As the plaintiffs adopt the note, they adopt it in all respects, according to the understanding and agreement of Heald and the defendant, and affected by knowledge of all facts known to them; and if, as between them, it was without value, and for the accommodation of the bank, then, whatever uses Heald made or intended to make thereof, the plaintiffs cannot recover."

4th. "To establish a consideration, upon the ground that the note was obtained or used by Heald to procure a loan from the bank, or to procure any other favor, benefit or advantage therefrom, it must be shown, that the defendant intended to give the note to Heald for the purpose of enabling him in his individual capacity, or had reasonable cause to believe, that he would use the note in his individual capacity to procure such loan or other favor, benefit and advantage; and also that, relying upon the said note, the bank did make to Heald such loan, or extended to him such favor, benefit or advantage."

5th. "The burden is upon the plaintiffs to prove some certain and particular consideration for the note; and unless they point out and establish, by the weight of the whole evidence, some such certain and particular consideration, they do not prove a valid note; and they do not prove a note valid beyond the extent of such established, certain and particular consideration."

6th. "If the consideration relied upon is money lent to the defendant, the consideration is good only to the extent of money proved to be so loaned; if it is money lent on the note by the bank to Heald, on the defendant's request, and within the conditions of the prayers aforesaid, it is good only to the extent of money proved to be so loaned to Heald; if the consideration is prejudice to the bank, arising from the defendant's intentionally

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assisting Heald to conceal true facts from the bank, it is good only to the extent of the damage proved to be caused by such prejudice; and the principal of the note, if the note is good to any extent, being ascertained, interest is to be cast accordingly, on that basis."

The judge instructed the jury as follows: 1st. "The burden of proof is on the plaintiffs to establish a consideration, and the burden does not shift from them to the defendant; the note, containing the words 'value received,' in law imports a consideration; and upon the evidence of the note itself, the plaintiffs are entitled to a verdict, unless there is some other evidence to affect it; the note, being produced, is *prima facie* evidence of a consideration; yet the burden is upon the plaintiffs to satisfy the jury, upon all the evidence, and by the preponderance of the evidence, that there was a consideration."

2d. "If the jury take the stories of the two witnesses, Edwards and Heald, or either of them, as true, the defence is wholly made out; but the jury are to consider all the facts and matters in evidence, and all the statements of those two witnesses on cross-examination; and if the jury are then in doubt upon these stories, and cannot say, upon all the evidence, that they were true, or so much was true as to affect the credit to be given to the notes, the note will enable the plaintiffs to recover."

3d. "In regard to the law of consideration, the law requires a valuable consideration; the gift of a note is not enough; nor is a mere moral obligation; it must be some benefit to the defendant, as money or the like; or some detriment, loss or prejudice to the plaintiff, as the forbearance of a right, &c., incurred by that party, at the defendant's request. The plaintiffs must satisfy the jury that some loss, trouble or prejudice has been suffered by the bank, at the request or by the procurement of the defendant."

4th. "Another view is: If no money was had by the defendant on the note, and yet it is proved that it was given by the defendant to Heald, to aid him in getting money from the bank and in concealing the condition of the bank, or to aid in any illegal transaction, and the money was accordingly obtained

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upon it from the bank by Heald, then the defendant is estopped, because this will constitute no defence to the note, he being estopped from alleging his own baseness."

5th. "Also if the defendant, not receiving any money for the note, gave it to Heald, not knowing that Heald wanted it for the purpose of concealing the condition of the bank, or of using it for any other illegal purpose, yet if he had reasonable cause to know it would be illegally used, and it was used by Heald to get money from the bank, he is estopped from alleging such fraud; and if the jury are satisfied that they were concerned together in this kind of enterprise, or if not, yet, if the defendant had reasonable cause to know that an illegal use was intended, the defendant is estopped from alleging such fraud, if money was procured upon it from the bank.

"If, as the plaintiffs contend, the bonds were purchased by Heald for himself, for his own purposes, and this note was obtained to enable Heald to get, replace or furnish money; and the note was placed in the bank for that purpose; and Edwards knew or had reasonable cause to believe this, the plaintiffs prove their case; and if fraud is alleged by the plaintiffs, the jury will presume against it, the law being, that he who alleges fraud must prove it."

The judge then proceeded to consider the defendant's prayers for instructions. The first prayer he adopted. The second he qualified thus: "I have instructed you, and repeat, that any prejudice caused by the parties to the plaintiffs constitutes a consideration to support the note; and that if the plaintiffs did receive some prejudice, at the request or procurement of the defendant, for which the note was given, it is enough." Upon the third prayer, he said to the jury: "I do not instruct you so; but instruct you, that if they knew that the object of the note was to deceive the bank, or to obtain money for Heald from the bank, then that is enough to create a consideration, if the money was obtained upon it accordingly from the bank." Upon the fourth prayer he said: "I repeat what I have said; if Heald wrongfully used the note, in fact to get a personal benefit, and the defendant gave it, intending to aid him, or having rea-

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sonable cause to believe it was to be used for that purpose, then the note going into the bank and representing property of the bank gone somewhere, this would make a sufficient consideration." The fifth instruction prayed for was refused. The sixth was assented to by the plaintiffs, and therefore adopted by the court.

The defendant's counsel then requested the court to instruct the jury, "that if they believed, upon the evidence, that Edwards himself did not receive any money or other value for the note, then the note no longer imported, and was no longer *prima facie* evidence of a consideration; but that the plaintiffs must then show affirmatively, by other evidence than the note, that some prejudice or loss was sustained by the plaintiffs, for which the note was given." But the court refused so to rule; and instructed the jury, "that the note was *prima facie* evidence of a consideration; and that showing that one species of consideration was not the one did not alter this."

The jury returned a verdict for the plaintiffs; and to all the rulings and instructions of the judge, so far as they were inconsistent with and did not sanction the instructions prayed for, the defendant excepted.

R. Choate & E. A. Dana, for the defendant. 1. The second instruction in fact shifts the burden of proof as to consideration from the plaintiffs to the defendant, and thus modifies the previous ruling on that point, and overrules the defendant's first prayer. That prayer, as well as the defendant's last one, should have been granted. *Powers* v. *Russell*, 13 Pick. 76. *Delano* v. *Bartlett*, 6 Cush. 364. *Brown* v. *King*, 5 Met. 180. *Burnham* v. *Allen*, 1 Gray, 501, 502. Byles on Bills, (5th ed.) 92. The court should also have instructed the jury as to the degree of "credit to be given to the notes," which is matter of law; and should have required proof of some particular consideration.

2. The third instruction, as a legal definition of consideration, was incomplete in itself, and insufficient for the purposes of this case, because, taken in connection with the defendant's second prayer and the ruling thereon, it omitted and excluded the element of intelligent consent or intention, on the part of the

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promisee, to suffer some loss or prejudice. Chit. Con. (8th Amer. ed.) 9 *& seq.* If, for the purpose of making out such intelligent consent, it was necessary to find that Heald represented the bank, then he must be taken as the proper representative of the bank in the whole transaction, and the defendant's third prayer should have been granted without qualification.

3. The fourth instruction was erroneous, and founded upon a misconception of the defence, which was want of consideration, and not fraud. *Wearse* v. *Peirce*, 24 Pick. 145. Upon the hypothesis presented in this instruction, the consideration set up by the plaintiffs was in itself illegal, and the note therefore void. Byles on Bills, 103. And the instruction as to estoppel was clearly wrong; for the doctrine of estoppel was not applicable to the case presented. *Dewey* v. *Field*, 4 Met. 385. *Heane* v. *Rogers*, 9 B. & C. 577. *Jackson* v. *Pixley*, 9 Cush. 490. *Merriam* v. *Cunningham*, 11 Cush. 40. *Agricultural Bank* v. *Robinson*, 24 Maine, 274. Similar objections apply to the fifth instruction.

E. R. Hoar & A. A. Ranney, for the plaintiffs.

By the Court. 1. The instructions of the court upon the burden of proof and the evidence of consideration were correct. *Delano* v. *Bartlett*, 6 Cush. 364. The degree of credit to be given to the note is not matter of law, except so far that it is sufficient of itself, in the absence of any other evidence, to sustain the action; but its degree of credit, as compared with other evidence that may conflict with it, is for the jury. The judge correctly ruled that showing that the defendant had not himself received the consideration would not affect this rule; and rightly refused to instruct the jury that the plaintiffs must prove "some certain and particular consideration."

2. The plaintiffs did not seek to recover except upon proof of money received from them by the defendant or Heald upon the note, nor did any of the instructions of the judge authorize the jury to find a verdict for the plaintiffs without proof of such a consideration. The second of the defendant's prayers for instructions was rightly overruled; because an advance of money to a person to whom the defendant had given the note

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with power to use it would be a sufficient consideration, and would come under the head of prejudice to the plaintiffs, though nothing had been received by the defendant. The only intelligent consent required of the plaintiff corporation was the consent of their agent Heald. The adoption of a note obtained by an agent within his authority does not include the adoption of a fraudulent agreement or understanding between the agent and the other party beyond the line of the agent's authority.

3. The fourth and fifth instructions given were, in substance and effect, that if no money was received by the defendant on the note, yet if it was given by him to Heald to aid him in illegally getting money from the bank and concealing the condition of the bank, or with reasonable cause to know that such was Heald's purpose, and Heald obtained the money accordingly, the defence could not be maintained. This instruction required the plaintiffs to prove that money was actually obtained from them upon the note. That was of itself a sufficient consideration, which entitled the plaintiffs to recover. The further statements of the judge, that the defendant would be estopped to allege his own baseness or fraud, were entirely immaterial.

Exceptions overruled.

The *second* action was brought to recover the interest from April 1st 1855 to October 1st 1855 on the whole note, and the first instalment of four thousand dollars; and the *third* action was brought to recover the last instalment of ten thousand dollars, with interest thereon from October 1st 1855. The defendant, in his answer to each action, alleged that the note was made without consideration, at the plaintiffs' request, and for their accommodation. The plaintiffs filed replications, denying these allegations, and alleging that these questions had once been finally adjudicated between the same parties in the first action.

The second and third actions were tried together in this court at March term 1858 before *Bigelow*, J., who reserved them for the judgment of the whole court upon the following report:

"The defendant admitted the signature; and the plaintiffs put in evidence the note in suit, and then offered the records of the

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court below in the former action, the defendant's bill of exceptions and the record of the decision of this court thereon, overruling said exceptions and entering judgment on the verdict for the plaintiffs.

"The plaintiffs contended that by this evidence it appeared that the subject matter of judicial controversy, on the pleadings in these two actions, was directly put in issue on the pleadings in the former action, submitted in evidence, and distinctly found by the jury; that the points now raised were directly included within the issues, and were essential to the verdict, and that judgment was therefore conclusive against the defendant, and precluded him from setting up again in these actions that the note was without consideration and made for the plaintiffs' accommodation.

"The defendant objected, and contended that said records were not admissible, and that said judgment was not conclusive, and did not preclude him from the same defence again; on the ground that the other suit was for interest only, and not for the same cause of action."

These cases were argued and decided at March term 1859.

Ranney, for the plaintiffs.

Choate & Dana, for the defendant. The judgment in the former action is neither conclusive nor admissible against the defendant in these, founded upon distinct and different promises, which may have been made upon distinct considerations, and which present different issues. The proof, which might be sufficient to charge the maker of a note for an instalment of interest falling due before the principal sum, might be wholly insufficient and irrelevant to charge him for the principal. A note might well be made merely for the purpose of securing for a stipulated time a series of payments corresponding to its maturing instalments of interest, and wholly without consideration as to its principal. Nothing can be pleaded by way of estoppel, or relied on as conclusive evidence, unless it has been put directly in issue and found by a former verdict. The rule cannot be extended to collateral facts, or to facts to be deduced by inference from the former finding of the jury. *Gilbert* v. *Thompson*, 9

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Cush. 348. *Dutton* v. *Woodman*, 9 Cush. 261. *Bigelow* v *Winsor*, 1 Gray, 299. *Eastman* v. *Cooper*, 15 Pick. 276. *Richardson* v. *Boston*, 19 How. 268.

BIGELOW, J. The doctrine of *res judicata* as a bar to a subsequent action between the same parties, with its proper limitations and modifications at common law, as well as under the system of pleading now in force in this commonwealth, has been very clearly and fully stated in the recent case of *Sawyer* v. *Woodbury*, 7 Gray, 499. According to the principle there laid down, there can be no doubt that the former judgment rendered in the action between the same parties who are now litigating the present suits, and which is fully set forth in the plaintiffs' replications, is conclusive against the defendant on the several grounds of defence alleged in his answers.

The declaration in the former action set forth the same note as that now declared on, and alleged that there was due thereon the interest from October 1st 1854 to April 1st 1855. To that claim for interest the defendant pleaded that the note was made for the accommodation of the payees, and at their request. Upon the issue thus raised, it appears by the evidence now adduced by the plaintiffs, that testimony was offered at a former trial, and a verdict for the amount of the interest then due was found for the plaintiffs, on which judgment has since been rendered.

On examination of the answers in the present actions, it will be found that the same grounds of defence are alleged as were set up in the former action. It is true that, strictly speaking, the plaintiffs now sue on a different cause of action from that on which the former suit was brought; that is, they now claim to recover the whole principal due on the same note, and the interest thereon which has accrued and fallen due since the former action was commenced. But the question here is, not on the identity of the cause of action, but on the identity of the grounds of defence set up in the former action, with those relied on in answer to the present suits. These are precisely the same. The facts alleged, as showing payment of the principal and interest in those actions, are identical with those which were averred and

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attempted to be shown in defence to the claim for interest in the first action. The fact that the note was given as an accommodation note, for the use of the payee, and without any consideration, was distinctly put in issue in the former suit, and evidence in support and disproof of this fact was offered by both parties at the trial of that action. These averments of facts were precisely stated on one side and traversed on the other, and they were directly, not inferentially, found by the jury by the former verdict. They must therefore be taken as fixed facts between the parties for all purposes.

Judgment for the plaintiffs.

WILLIAM BARRY *vs.* LEMUEL PAGE & another.

The objection that a transitory action brought by a citizen of another state is not brought in the county of the defendant's residence or place of business, as required by St. 1856, c. 70, cannot be first taken after verdict.

A foreign principal may maintain an action in his own name for goods sold by his agent here, although no agency is disclosed at the time of the sale.

ACTION OF CONTRACT by a citizen of New York to recover the price of goods sold by his factors in Boston to the defendants.

At the trial in the superior court of Suffolk at January term 1858, it appeared that the goods were consigned by the plaintiff to the factors, and sold by them without mentioning their principal or indicating in any way that they were not their own, and that they subsequently presented bills for the goods in their own name.

The defendants asked the court to rule that the action should have been brought by the factors, and could not be maintained in the name of this plaintiff. But *Nash*, J. ruled that the action was rightly brought, a verdict was returned for the plaintiff, and the defendants alleged exceptions.

B. Dean, for the defendants, in support of the exceptions,

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cited Story on Agency, §§ 288, 290, 400, 423, 448; Paley on Agency, 324, (3d Amer. ed.) note; *Merrick's estate*, 5 W. & S. 14.

He also moved in arrest of judgment, because, as appeared on the face of the writ, the plaintiff lived out of the State, and the defendants resided and had their place of business in the county of Middlesex; and therefore by *St.* 1856, *c.* 70, this action could only be brought and determined there.

C. P. Hinds & W. Tilton, for the plaintiff.

Bigelow, J. 1. The objection to the jurisdiction of the court over the person of the defendant comes too late after he has pleaded to the merits and had a verdict rendered against him. *Brown* v. *Webber*, 6 Cush. 564. *Loomis* v. *Wadhams*, 8 Gray, 561.

2. As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal. There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal, who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such case be let in to all the equities, set-offs and other defences to which he would have been entitled, if the action had been brought in the name of the agent. But in the case at bar it does not appear that the defendant has any defence to the action, which he could have made if it had been brought by the agent. The objection is purely technical, and goes only to defeat the right of action by the principal, irrespectively of any meritorious answer to the suit.

It has been sometimes said that when a sale is made by a factor for a foreign principal, the latter cannot sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is, that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract. But the later and better opinion is, that there is no such absolute pre-

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sumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by his factor, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof, other than the mere fact that the principal resided in another state or country. Story on Agency, § 420. Paley on Agency, (4th Amer. ed.) 324, note. *Taintor* v *Prendergast*, 3 Hill, 72. *Ilsley* v. *Merriam*, 7 Cush. 242. No fact appears in the exceptions to show any exclusive credit by which to take the present case out of the ordinary rule by which the principal can maintain an action in his own name.

Exceptions overruled.

JONATHAN BASS *vs.* HAVERHILL MUTUAL FIRE INSURANCE COMPANY.

The submission of a case in writing to the judgment of the superior court or court of common pleas upon evidence, "to be tried without the intervention of a jury," is a waiver of a trial by jury, pursuant to *St.* 1857, *c.* 267; and from the judgment thereon, if no exceptions are taken, no appeal lies.

ACTION OF CONTRACT upon a policy of insurance. In the superior court of Suffolk, the parties in writing "agreed that this case be submitted to the court, to be tried without the intervention of a jury," upon the policy and application and notice of loss, the plaintiff's evidences of title, and a deposition filed in the case; and "that the court may enter such judgment and for such amount as shall be thought correct." That court rendered judgment for the plaintiff, from which the defendants appealed. The plaintiff now moved to dismiss the appeal.

W. Brigham, for the plaintiff.

F. W. Hurd, for the defendants.

BY THE COURT. The agreement of the parties in this case is a waiver of a trial by jury, pursuant to *St.* 1857, *c.* 267. After such an agreement in the superior court or court of common pleas, if no exceptions are taken, no appeal lies to this court.

Appeal dismissed.

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John Shelton & another *vs.* Gardner Banks.

A resolve of the executive council of the Commonwealth in 1786, establishing "a company of artillery" in a town, "agreeably to military law," did not make them a corporation.

Nonjoinder of a defendant in an action of contract can be pleaded in abatement only.

Action of contract for military goods sold and delivered to the defendant.

At the trial in the superior court of Suffolk at January term 1857, the defendant offered evidence tending to show that he and another person were a committee duly appointed and empowered by the Waltham Artillery, a military corps, to purchase these goods for that company; that these goods were purchased by them as such committee, and used by the company; and that this company, with a change of its name and place, had been in existence ever since 1786, when it was organized under the following resolve of the executive council of the Commonwealth: "Advised, that a company of artillery be established at Watertown, agreeable to the military law."

It was admitted that the goods were delivered to the defendant, and that he was a member of the company and captain thereof. The defendant had not pleaded in abatement the nonjoinder of the other members of the company.

Nash, J. ruled that the fact that the goods were sold and delivered to the defendant as one of the committee of the company, of which company he was a member, was not a defence to the action. A verdict was rendered for the plaintiffs, and the defendant alleged exceptions.

A. V. Lynde, for the defendant. This company, having been formed before the passage of the act of congress of 1792, c. 29, or the militia laws of the Commonwealth, differs in organization from military companies formed since. It is in the nature of a corporation, and the company, and not a committee, much less a single member of the committee, is liable to this action.

A. E. Giles, for the plaintiffs.

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By the Court. The resolve of 1786 was not an act of incorporation. The Waltham Artillery were a voluntary association of individuals, recognized by law, but having none of the attributes of a corporation. Of this association the defendant was a member, and liable jointly with his associates for their debts. The nonjoinder of the others as defendants, upon familiar principles of pleading, could be pleaded in abatement only.

Exceptions overruled, with double costs.

Joseph W. Balch *vs.* George W. Hallet & others.

Under a will which declares that all moneys paid as and for dividends on shares in any corporation held by trustees under the will "shall be deemed and taken to be income and be appropriated as income according to the provisions of my will, excepting such dividends as shall be made and declared expressly as dividends of capital," *cestuis que trust* for life are entitled to dividends on shares in a wharf corporation, of profits arising from purchasing land, filling up flats, laying out streets, and erecting, leasing and selling warehouses, although in part consisting of proceeds from the sales of real estate of the corporation, if it does not appear that the capital or the value of the shares has been thereby diminished; and even, *it seems*, if it does so appear.

Appeal from a decree of the judge of probate, allowing the account of the trustees under the will of George Hallet, in which they were credited with payments to *cestuis que trust* for life of dividends on stock in the Mercantile Wharf Corporation, incorporated by *St.* 1826, *c.* 13, with power to purchase a wharf estate in Boston, and "to sell their corporate property or any part thereof, and to lease, manage and improve, build, rebuild, pull down or alter the same; also to remove, construct, erect, repair or alter any buildings, wharf or wharves, docks, streets or passage ways, within said limits, according to their will and pleasure;" and who had, pursuant to their charter, purchased land, flats, wharves and stores, leased them, built other stores, filled up flats, made streets and sold some of the stores; using for these purposes moneys received from assessments on stock-

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holders and from rents and sales of stores and lands. Dividends were from time to time made as dividends of the profits of the business of the corporation conducted as above stated. The shares in the corporation had increased in value during the trust. The charter and course of business of the corporation were well known to the testator, who devised the residue of his estate, after payment of debts, charges and legacies, in trust to pay the income thereof to his children for life, and afterwards to transfer the principal of each child to its issue, or in default of such issue to the testator's heirs at law; and further declared, "It is my will that all moneys which shall be paid as and for dividends on any investment that may be held by my trustees in any corporation or association shall be deemed and taken to be income, and be appropriated as income according to the provisions of my will; excepting such dividends as shall be made and declared expressly as dividends of capital."

The reason of appeal was, that upon the facts above stated the dividends must be deemed dividends of capital, and therefore be reinvested and retained by the trustees as part of the trust fund for the benefit of those interested in remainder.

This case was argued in writing by *T. B. Hall*, for the appellant and appellees.

Bigelow, J. The only question arising on this appeal is the one stated in the reason filed by the appellant; and the decision of it turns on the right of the trustees to the allowance of a credit in their account rendered to the judge of probate of certain dividends received from the Mercantile Wharf Corporation, which they have paid over to certain *cestuis que trust* for life under the will of George Hallet deceased. The position of the appellants is this: that the sums thus credited cannot properly be regarded as income or profits on said stock, to which alone, by the terms of the will, the *cestuis que trust* are entitled; but that they are in their nature an extraordinary bonus or unusual addition to the ordinary dividends, or profits of said stock, arising from the sale of part of the corporate property, and ought to be deemed substituted capital, and added to the principal fund, for the benefit of those who will be entitled thereto on the death of the *cestuis que trust* for life.

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There can be no doubt of the general rule of law, applicable to trust estates, that when a dividend is declared and paid to trustees on funds in their hands derived from the sale of trust property, by which the principal fund is impaired or diminished, or where moneys are received as the proceeds of what are termed wasting securities, such as leasehold estates, which in progress of time will expire or perish or become of greatly diminished value, if the funds are held on a trust by which the income is to be paid for life to certain persons, and on their deaths the remainder is given to other persons, it will be the duty of the trustees to add such dividends or moneys to the principal fund so as to preserve it unimpaired for those entitled in remainder. *Paris* v. *Paris*, 10 Ves. 185. *Howe* v. *Dartmouth*, 7 Ves. 151. *Mills* v. *Mills*, 7 Sim. 509. Hill on Trustees (3d Amer. ed.) 386, 432.

But we do not see that, on the facts stated by the parties, this rule is at all applicable to the present case. There is nothing from which it appears that the dividends which the trustees have paid over to the *cestuis que trust* for life, and for which they claim credit in their account, are of a nature which in any degree impairs the value of the principal fund, or should cause them to be regarded as paid out of the capital stock of the corporation. The main purpose for which the corporation was established, from which these moneys were received, was to purchase a large quantity of real estate lying in that part of the city where wharf property and stores would, in the course of time, be much needed; and by filling up flats, making streets, erecting stores and carrying forward other improvements, to increase the value of the estate thus purchased and enlarged and improved, and thereby to obtain large gains and profits on the original investment or capital stock. It is in the nature of a trading corporation. Property invested in its capital stock is to be regarded in the same light as shares in an insurance, manufacturing or banking corporation. In the absence of any facts showing that the dividends in question were a part of the capital of the corporation, or that the payment of them essentially impaired or diminished the value of the shares, they are to be taken as part of the revenue or profits to which the *cestuis que trust* for life are entitled.

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The testator himself probably had in view property of the nature of these shares in the Mercantile Wharf Corporation, which he owned at the time of his decease, in making the provisions in his will, in which he directs that "all moneys which shall be paid as and for dividends on any investment that may be held by my trustees in any corporation or association shall be deemed and taken to be income, and be appropriated as income according to the provisions of my will; excepting such dividends as shall be made and declared expressly as dividends of capital."

Under this clause we are inclined to think the trustees would have been well authorized in making payments of these dividends, which were not declared as dividends of capital, to the *cestuis que trust* for life, even if it had been made to appear that they did encroach on the value of the principal fund.

Decree affirmed.

JOHN H. SHATTUCK *vs.* NICHOLS LAWSON.

A partner, who upon the dissolution of the partnership has received all the partnership assets, and agreed to apply them to the payment of the outstanding debts, for which they are sufficient, is not liable to an action at law by his copartner, for the amount of a partnership debt, which he has been obliged to pay, without showing a final settlement of the partnership business, or that there are no other debts outstanding.

An agreement of a partner with his copartner upon the dissolution of the partnership, to apply to the best of his judgment the partnership assets towards its outstanding debts, will not support a declaration alleging that the defendant agreed to pay all the outstanding debts of the partnership, and neglected and refused to do so. And the defendant may avail himself of this variance under an answer admitting the execution of the agreement (a copy of which is annexed to the declaration) and denying all the other allegations of the plaintiff.

ACTION OF CONTRACT. The plaintiff alleged that the defend ant with him signed a certain promissory note, and the defendant promised to pay it at maturity, and received from him, as a consideration for paying it, all the assets of a partnership previously existing between them; yet the defendant neglected to pay the note or any part thereof, and the plaintiff was obliged to pay it.

In an additional count afterwards filed, it was alleged that

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the plaintiff and defendant, then and previously copartners, on the 10th of July 1852 dissolved their partnership, and the defendant purchased and received from the plaintiff all his interest in the partnership assets, and in consideration thereof made an agreement in writing (a copy of which was annexed, and is printed in the margin *) to pay all the outstanding debts of the partnership, among which was a certain promissory note; that the defendant neglected and refused to pay that note, and that the plaintiff was obliged to pay it, with costs.

The answer admitted the agreement, and averred that the defendant had kept and performed it, and denied the other allegations of the declaration.

At the trial in the superior court of Suffolk at March term 1856, the plaintiff stated that the agreement was made after the dissolution of the partnership and to close their business; and offered to prove, that under it the defendant had received all the assets of the partnership, which were more than sufficient to pay all their debts, yet had not applied the proceeds thereof to the payment of the debts, but had appropriated them to his own use; and the plaintiff, two years after the dissolution, was called upon to pay the promissory note mentioned in the declaration, and an action was brought against him upon it in Massachusetts, of which the defendant was notified, and refused to apply the proceeds of the assets in his hands to the payment of the note, and the plaintiff was obliged to pay it.

There had been no final settlement of the partnership concerns between the parties; but the plaintiff contended that "said agreement was of itself in law a final settlement of said copartnership between these parties, if the assets were fairly sufficient to pay the debts of said firm; as he claimed nothing from the assets over and above the amount of the debts."

The plaintiff further offered to prove that the action on the

* "New York, July 10th 1852. This is to certify that I, the undersigned, have received from John H. Shattuck all his right, title and interest in the stock, tools, and all bills outstanding due to the late firm of Lawson & Shattuck, shipwrights, caulkers and spar makers, at No. 272 South Street, which I agree to apply towards the payment of the debts outstanding against said firm to the best of my judgment. Nichols Lawson."

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note was commenced at the defendant's direction, and that the money thereby collected of the plaintiff came to the hands of the defendant.

The plaintiff contended, that as it was not alleged by the defendant that there were outstanding claims against the partnership, it could not be presumed that there were; and that the agreement set forth having been made after the dissolution of the copartnership, and the answer of the defendant having admitted that it was so made, and averred that it had been fully performed on his part, the plaintiff had a right to go to the jury on that issue.

Nelson, C. J. instructed the jury that the plaintiff could not maintain his action, a verdict was taken for the defendant, and the plaintiff alleged exceptions.

W L. Burt, for the plaintiff, cited *Dickinson* v. *Granger*, 18 Pick. 315; *Bond* v. *Hays*, 12 Mass. 34; *Wilby* v. *Phinney*, 15 Mass. 116; *Fanning* v. *Chadwick*, 3 Pick. 420; *Brinley* v. *Kupfer*, 6 Pick. 178; *Rockwell* v. *Wilder*, 4 Met. 556.

N. Morse, for the defendant.

Bigelow, J. The facts proved at the trial did not show that there was any sum due to the plaintiff as a final balance after a settlement of all the business of the firm and the payment of all its debts. The evidence only tended to prove that the property of the partnership, which passed into the hands of the defendant, was sufficient to pay the debts due from the firm at the time of its dissolution; but it did not appear that there was any surplus left in the hands of the defendant, nor that his own claims on the assets of the firm had been paid or satisfied, nor that this was the only claim outstanding. Such proof was essential to enable the plaintiff to recover in an action at law against his copartner as upon a final settlement of the affairs of the copartnership. *Sikes* v. *Work*, 6 Gray, 433, & cases cited.

But the main reliance of the plaintiff at the trial seems to have been on his second count, in which he claims to recover the amount of a debt due from the firm, which he alleges that he was compelled to pay in violation of the agreement between himself and the defendant, made at the time of the dissolution

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of the firm. The difficulty in maintaining the action on this count is, that it sets out no breach of the contract annexed to the declaration. The amended count seems to have been framed upon an entire misconception of the legal effect of the contract. It alleges that the defendant agreed to pay all the outstanding debts of the firm, and avers as a breach that the defendant neglected and refused to pay the note annexed to the declaration, and that the plaintiff was compelled to pay the same with costs. But the written contract contains no such agreement. The defendant did not undertake to pay all the debts of the firm. He only agreed to apply the partnership property and assets, which were placed in his hands, towards the payment of the outstanding debts of the firm, according to the best of his judgment. Beyond this he assumed no responsibility and incurred no liability to his copartner. There was therefore a fatal variance between the contract set out in the declaration and the written agreement offered in evidence. There was no averment that the defendant agreed to apply the partnership property in his hands towards the payment of the debts of the firm according to the best of his judgment, and no allegation of any breach of this stipulation. The evidence offered at the trial, that the property and assets of the firm in the hands of the defendant were sufficient, if properly applied, to pay all the debts of the firm, and that the defendant refused to apply them to that purpose, but appropriated them to his own use, did not sustain or correspond with any allegation contained in the declaration. The evidence would have been competent in support of a count properly framed on the contract, but had no tendency to prove the agreement as set out in the plaintiff's amended count.

Under the denial, contained in the answer, of each and every allegation in the amended declaration, except the execution of the written contract, the plaintiff was bound to prove the averments in his declaration; and it was competent for the defendant to object, not only that the written contract did not support the agreement as set out in the declaration, but that the evidence offered to prove a breach of the contract was inadmissible, because it had no tendency to show such a breach as the plaintiff had averred in his amended count *Exceptions overruled.*

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Jesse Fogg & another *vs.* John Pew.

Conversations before the organization of a corporation, but in contemplation thereof, between persons who subsequently become officers and stockholders therein, are inadmissible against the corporation as evidence of an agreement to organize and transact business as a corporation without paying in the capital required by law; even if accompanied by evidence that the capital stock was afterwards pretended to be, but was not actually, paid in.

Neither the return which an insurance company are obliged by law to make to the secretary of the Commonwealth, nor a contract between them and their agent, is admissible in an action upon a premium note given to them, to show that the company fraudulently held themselves out as solvent, or that their officers were aware of their insolvency; without evidence that these facts were known to the maker of the note, or influenced him to procure the insurance.

Declarations of an agent of an insurance company, who has authority only to obtain applications for insurance and transmit them to the company, are inadmissible to show that the company represented that their capital stock was paid in, when it was not.

Fraudulent representations of the officers of an insurance company, concerning the solvency of the corporation and the payment of their capital stock, are no defence to a suit upon a premium note given to the company, unless these representations were held out at the time when the note was made, and for the purpose of obtaining it.

Action of contract by the assignees in insolvency of the Metropolitan Fire and Marine Insurance Company, upon two promissory notes respectively made on the 5th and 21st of April 1854, and payable in nine months, for the premiums on two policies of insurance which terminated on the 30th of November 1854.

Answer, 1st. That the insurance company were insolvent at the time of issuing the policies, and continued so during the whole term of the risks; and that the officers of the company knew this, and intended to defraud the defendant, and did in fact deceive and defraud him; 2d. That the company became insolvent by the fraud of their officers, after making the policies; 3d. That no part of the capital stock of the company was ever paid in according to law; 4th. That the capital stock, if paid in, was never invested according to law.

At the trial in the superior court of Suffolk at November term 1856, before *Abbott*, J., the defendant, for the purpose of showing that the capital stock of the insurance company was never paid in, was permitted, against the plaintiffs' objection, to intro-

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duce evidence of conversations between persons who afterwards became officers and stockholders in that corporation — both before their charter was obtained, but in contemplation thereof; and after the charter was obtained, but before the corporation was organized under it — as tending to show a concert and agreement among them (afterwards carried into effect) to organize the corporation, and transact business, without actually paying in the capital.

Evidence was offered tending to show that the capital stock was subscribed for and paid in by instalments before the date of the policies to the defendant.

The defendant introduced evidence tending to show that no part of the capital stock was actually paid in, so as to be within the control of the corporation, whatever might be the statement as to such payment on the books of the corporation; that said pretended payment was merely colorable and fraudulent, and made for the purpose of inducing the public to believe the capital was paid in, when in fact it was not; that the payments were made by the stockholders, the larger part in amount of whom were also directors, on the opening of the office of the company; that as soon as the money was counted by the secretary, by ascertaining the amounts on the wrappers inclosing the bills, it was taken possession of by the treasurer of the company, who was also president; and that it was immediately returned to the stockholders paying it, in pursuance of an arrangement for that purpose between said president and treasurer and said stockholders. The evidence also tended to show that none of the directors or officers of said company, except the president and treasurer, ever had any control of the money so paid in, or knew how it was used or invested; and that those directors of the company who resided in Boston had no knowledge of the transactions aforesaid, in reference to the payment of the stock, but supposed that it had been paid in. To this and all evidence in reference to the payment and investment of the capital stock of the company, the plaintiffs objected, upon the ground that, if there was fraud in this respect, it was the fraud of the president and treasurer, and not of the company, and the

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defendant could not avail himself of the non-payment of the capital in defence to this action; that he was precluded from it by taking the policies and giving the notes in suit to the corporation, and also by the fact that the plaintiffs were assignees under an assignment made in pursuance of the insolvent laws of this commonwealth, which was conclusive evidence of their right to sue; and that the corporation were regularly authorized to transact business, and did in fact pay their contracts, till some time after the making of the defendant's policies. But the court admitted the evidence.

The defendant was also permitted, against like objection, to put in evidence the return made by the insurance company to the secretary of the Commonwealth, as required by law, in December 1853, and sworn to in March 1854, for the purpose of showing the condition of the corporation at that time, and that they held themselves out to the world as having their capital stock paid in.

The judge also, against the plaintiffs' objection, admitted in evidence, for the purpose of showing that the company were insolvent and that their managing officers knew it, a contract between the company and their agents in New York, (appointed "to take applications, countersign policies, and collect premiums, with authority to make the same binding upon this company,") in reference to the terms upon which insurances were to be made by the agents, and the compensation for their services.

Evidence was introduced that the policies were obtained through one Dolliver, an agent of the insurance company to receive applications for insurance only, and transmit them to the company, and who did receive and transmit the defendant's applications. The defendant, against the plaintiffs' objection, was allowed to testify that before making the applications to Dolliver he asked him what the capital stock of the company was, and whether it was paid in, and that Dolliver replied that it was all paid in and invested, and the defendant was induced by these representations to make the applications and take the policies.

The judge, among other instructions to the jury, gave the fol-

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lowing: "If the Metropolitan Insurance Company, at the times of making the policies on which the notes in suit were given, were in fact insolvent, and did not possess the ability and means to indemnify against the losses which might happen on said policies, and this was known to the officers of said corporation, who made said contracts on their behalf, or any of them, and was not known to the defendant; and said officers did any acts or made any representations for the purpose of concealing their condition, and inducing the defendant to believe in their solvency and ability to perform their contracts, and so to insure with them; and he was deceived by said acts and representations, and induced by them to take the policies and give the notes in suit for the premiums; then he would not be liable for said notes, unless, after knowing said facts, he had affirmed the policies by claiming under them as valid contracts.

"In reference to the character and nature of the acts and representations to be proved, and the circumstances under which they must be made on the part of the company, it would be sufficient to show them done or made publicly or to a third person, if done or made for the purpose of defrauding and deceiving all who might deal with them, provided such acts or representations became known to the defendant, and he was deceived by them, and so induced to make the notes in suit.

"But mere insolvency on the part of the company, although known to its officers, without any acts done or representations made for the purpose of concealing or deceiving as to their true condition, would not be sufficient to defeat a recovery in this case, although the defendant might have believed in their solvency at the time of contracting with them, and although he would not have entered into such contracts but for such belief.

"If the capital of said company or any part thereof had never been paid in according to law, and the officers of said corporation had represented and held out to the world that it had been so paid in, for the purpose of inducing persons generally to insure with them, which representations came to the knowledge of the defendant, and he, relying on them, had been thereby induced to make the contracts of insurance with them, for which

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he gave the premium notes in suit; the existence of such a state of facts would constitute a defence in this action, provided the defendant never affirmed the contracts after knowing the facts aforesaid, and the corporation were insolvent at the time of making said policies, or became so before the expiration of the risks insured against in the same.

"The burden of proof was on the defendant to establish that no part of said capital stock was ever paid in, and all the other propositions embraced in the aforesaid instructions."

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

W. R. P. Washburn & G. W. Smalley, for the plaintiffs.

R. H. Dana, Jr., for the defendant. 1. The evidence of conversations, before the organization of the corporation, but in contemplation of it, between those who afterwards became officers and stockholders in the corporation, and who were the contracting officers at the time of making these policies, was rightly admitted, in connection with evidence of the manner in which the pretence of paying in the capital was gone through with, (which necessarily involved the officers,) and with evidence that the plan was carried into effect in manner and form. It involved the same false representations which constituted the defence, and formed part of the chain of proof; and only carried back to an earlier period evidence of a fraudulent design, subsequently carried out. *Cook* v. *Moore*, 11 Cush. 213.

The evidence of the pretence of paying in capital was admitted only as a part of the proof that no capital was paid in, and that a false representation to the contrary was made to the defendant.

2. The return of the secretary of the company was admitted as part of the proof of false declarations, and available to the defendant, under the instructions given to the jury, only upon proof that he knew and relied upon them.

3. The contract of the company with their agents in New York was the act of the insurers, tending to show that they knew that they were insolvent.

4. The statements of Dolliver could not, under the instruc-

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tions given, be regarded by the jury, unless he was an officer or agent authorized to contract and make statements, or was a third person through whom the false representations were made to the defendant by the insurers.

5. The instructions required the defendant to prove that the insurers were and continued insolvent, or failed to pay in any part of their capital, or failed to invest it according to law; and that they represented the contrary, knowing it to be untrue, for the purpose of procuring contracts of insurance, either to the defendant directly or through a third person, and that he knew of these representations and relied upon them. The ruling indeed went too far in requiring proof of actual fraudulent intent; which was not necessary, if the representations were known to be false, and were naturally calculated to mislead a person who had a right to rely upon them.

No evidence of anything subsequent to the date of the notes was admitted, unless as tending to prove a fact existing before that time.

Bigelow, J. Several of the rulings, to which exceptions were taken in the course of the trial of this case, were erroneous.

1. Evidence of conversations between divers persons, which took place before the act incorporating the company of which the plaintiffs are assignees was passed, was clearly incompetent. The corporation certainly could not be bound by the declarations of persons, made before they had any existence, and the plaintiffs as assignees stood in the same position as the corporation. A party cannot be affected by any statements, unless they are shown to be made by him or by some one authorized to speak in his behalf. The fact that the persons whose declarations were admitted were subsequently officers or stockholders in the corporation did not show any adoption or ratification of these previous statements by the corporate body after its creation and organization. Nor was it even made to appear that they were known to those who constituted the majority of the stockholders of the corporation, and who took part in its establishment and organization. Under these circumstances, we are at loss to see on what possible ground such evidence could be held to be admissible.

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2. The return made by the corporation to the secretary of the Commonwealth, in compliance with the provisions of the statutes, was irrelevant and immaterial to the issue before the jury, unless accompanied by further evidence that the defendant saw or knew of such statement, and was thereby deceived, and entered into contracts of insurance with the corporation, relying in some degree on the statements which it contained. The corporation were entitled to enforce contracts made by the defendant with them, notwithstanding their insolvency, unless he had been induced to enter into them by some fraudulent misrepresentations which were intended and allowed by the corporation to operate on his mind; and it was wholly immaterial that they had made false statements in their returns to the secretary, unless in some way they were brought home to the defendant, and were suffered to influence him in signing and delivering the notes in suit. *Alliance Mutual Ins. Co.* v. *Swift*, 10 Cush. 483.

3. The same reasons are applicable to the contract offered in evidence, between the corporation and their agents in New York. There was no evidence offered to show that the defendant had any knowledge of the existence of such a contract; and if he had known of it, we do not see that it tended to prove the fact of the insolvency of the corporation, for which purpose i was admitted. It was certainly very slight and remote evidence to prove the fact.

4. Evidence of the declarations of Dolliver was incompetent. He was a special agent only, with a limited authority to receive and transmit applications for insurance to the corporation. By virtue of such agency, he had no authority to make declarations concerning the condition of the company or the payment of their capital stock. The power of an agent to speak for his principal is confined strictly within the scope of his authority. 1 Greenl. Ev. § 113. Any statements concerning matters beyond this are hearsay and inadmissible.

5. The instructions to the jury were in one respect deficient in accuracy, and tended to mislead them. It was not a sufficient defence to the notes declared on, that the corporation had

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at some previous time made false and fraudulent representations concerning their solvency and the condition of their capital stock, for the purpose of inducing persons generally to deal with them, unless such representations were held out at the time when the defendant gave the notes, and to induce him to give them. This qualification was omitted. As the case was left to the jury, they might have found a verdict for the defendant on the ground of false statements or inducements, although they were not shown to have been continued or authorized when the defendant entered into the contracts of insurance in consideration for which the notes were given. The corporation through its agents may have been guilty of falsehood and fraud to other persons at other times. But they were not to be held responsible therefor in this action, unless it was proved that the circumstances were such as to lead to the inference that such misrepresentations were intentionally allowed to operate on the mind of the defendant in inducing him to execute and deliver the notes on which the plaintiffs now seek to recover judgment.

Exceptions sustained.

JAMES A. POTTER *vs.* FRANCIS O. IRISH.

Under the U. S. St. of 1850, c. 27, requiring every mortgage or conveyance of any vessel or part of a vessel to "be recorded in the office of the collector of customs where such vessel is registered or enrolled," the record must be made in the district of the last registry and enrolment, though not the home port of the vessel; and a mortgage not so recorded conveys no title as against an attaching creditor of the mortgagor, although his attachment is not made until after the mortgagee has taken possession for breach of condition of his mortgage.

ACTION OF TORT against a deputy of the sheriff of Suffolk, for the taking on mesne process of one fourth part of the Barque O. J. Chaffee, as the property of N. O. Bourne.

At the trial in the superior court of Suffolk at January term 1857, before *Nash*, J., there was evidence of these facts: The

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barque was built at Camden in 1849, and enrolled for the coasting trade on the 22d of November 1849 in the office of the collector of customs of the Belfast District, in which Camden is situated, and described in her enrolment as of Camden, and has ever since borne Camden on her stern, but has never since been at Camden. Bourne then owned one quarter, and, together with the owners of two other quarters, resided at Camden. Upon successive changes of owners of those two other quarters, the barque received temporary registers: on the 12th of January 1850, at New Orleans; on the 9th of June 1851, at Rockland, Maine; and on the 9th of December 1851 at Boston; in all of which she was styled as of Camden. On the 18th of September 1855 Bourne executed to the plaintiff, who resides at Providence, R. I., a mortgage of his quarter part of the vessel, which was recorded in the custom house at Belfast, and for breach of condition of which the plaintiff took possession before the defendant's attachment.

The defendant contended that the mortgage to the plaintiff was not recorded in accordance with the U. S. St. of 1850, *c.* 27, § 1, and was therefore void as against the attaching creditor, who had no notice thereof. The judge directed a verdict for the defendant, and the plaintiff alleged exceptions.

R. H. Dana, Jr. for the plaintiff. The question is whether, under the U. S. St. of 1850, *c.* 27, requiring all bills of sale, mortgages, hypothecations and conveyances of any vessel, or part of any vessel, to be "recorded in the office of the collector of the customs where such vessel is registered and enrolled," Belfast or Boston was the proper place for recording the mortgage from Bourne to the plaintiff; the one being the place of her domicil and permanent registration, and the other the place of her last temporary register. The policy of the laws of the United States is that each vessel shall have a domicil for the purposes of revenue and of ascertaining title. *St.* 1792, *c.* 39, §§ 3, 11, 12, 1 Sts. at Large, 288, 292, 293. *St.* 1850, *c.* 27, §§ 1–5, 9 Sts. at Large, 440, 441. *Hays* v. *Pacific Mail Steamship*, 17 How. 596. Treasury Regulations of 1857, pp. 1–30. For the purpose of ascertaining titles and recording incumbrances

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the balance of convenience and safety is greatly in favor of a rule that the place where the last permanent registration has been made need alone be looked to, rather than of a rule which would require a search for all possible temporary registrations. There is no question that the domicil of this vessel and her proper place of permanent registration were Camden. It will not be pretended that mortgages must be registered anew, under the act of 1850, on changes of domicil; still less on obtaining temporary registers away from home. *Brigham* v. *Weaver*, 6 Cush. 298. The temporary register does not vacate the permanent register, nor the temporary enrolment the permanent enrolment; but the permanent papers continue in force until the vessel returns to her port of permanent registration, and receives a new register or enrolment. *St.* 1792, *c.* 1, §§ 11. Treasury Regulations of 1857, *c.* 1, §§ 2, 4, 7; § 9, art. 47.

If the mortgage was not legally recorded, it was still valid as between the parties, as at common law; and the plaintiff had the legal title, with the right of possession at all times, which was made absolute by the breach of condition, and his taking possession; after which an attaching creditor of the mortgagor cannot set up want of record of the mortgage.

P. W. Chandler & G. O. Shattuck, for the defendant.

Bigelow, J. We regret that we are called upon in this case to give a construction to an act of congress, in anticipation of any interpretation of its provisions by the supreme court of the United States, whose decision upon it would be paramount and final. But as the rights of the parties to this action depend on the construction of the language of the statute, we cannot avoid the duty of giving our views of its true exposition.

By the first section of the act of congress of 1850, *c.* 27, it is provided that no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of a vessel shall be valid, against any other person than the grantor or mortgagor and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of customs where such vessel is registered and enrolled. 9 U. S. Sts. at Large, 440. The plaintiff claims to hold one

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fourth part of the vessel, which is the subject of controversy in the action, under a mortgage from the owner, recorded in the office of the collector of customs of Belfast, in the State of Maine. The defendant, on the other hand, having attached said one fourth on a writ against the mortgagor and owner, insists that the mortgage to the plaintiff is invalid against him, because there is no evidence of any actual notice to him of its existence, and it is not recorded in the office of the collector of the customs where the vessel was registered at the time the mortgage was made, in pursuance of the act of congress above cited. The real and only question at issue therefore is, whether, on the facts stated concerning the enrolment and registry of the vessel, the mortgage should have been recorded at the office of the collector in Belfast, where she was originally enrolled and where her owners at the time of such enrolment resided; or at the office of the collector in Boston, in which she was registered when the mortgage to the plaintiff was executed and delivered. This question can be determined only by referring to the various provisions of the laws of the United States, regulating the enrolment and registry of vessels, with a view to ascertain the place intended to be designated for the record of mortgages and other transfers of vessels by the statute of 1850.

As preliminary to this inquiry, and as essential to ascertain the true answer to be given to it, it is necessary to notice the purpose which congress had in view in enacting the provision requiring such mortgages and transfers to be put on record. Of this there can be no doubt. Its design was the same as that intended to be accomplished by all acts requiring a registry of deeds and other conveyances — to give notice to all persons interested of the true condition of the title, and to prevent innocent parties, like purchasers or creditors, from being injured or defrauded by the existence of prior transfers and incumbrances, of which they had no notice, and could obtain none, when they bought property, advanced money upon it, or gave credit to parties who were in possession and had the nominal title to it. Such being the manifest design of the statute, it is the duty of those who are called on to expound its provisions to give to

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them such an interpretation as will more effectually carry out the intention of its framers. Indeed, no other rule of exposition can be safely adopted in construing a statute the terms of which are ambiguously expressed, and are open to two different constructions.

By the act of 1792, *c.* 39, § 3, 1 U. S. Sts. at Large, 287, it is provided that every vessel shall be registered by the collector of the district in which shall be comprehended the port to which she belongs at the time of her registry, which shall be deemed to be the port at or nearest to which the owner, if there be but one, or, if more than one, the husband or managing owner of such vessel usually resides. By § 11 of the same statute it is provided that when any citizen shall purchase or become the owner of any ship or vessel entitled to be registered, she being within a district other than the one in which he resides, she shall be entitled to be registered by the collector of the district where she may happen to be at the time of his becoming owner thereof; it being provided however, that the register thus obtained shall be delivered up to the collector of the district where the ship or vessel belongs, whenever she shall arrive at a port comprehended within such district, and thereupon the collector shall issue a new register in lieu of the one so surrendered. A similar provision is made by § 12, in case of a purchase of a ship or vessel by an agent or attorney acting in behalf of a citizen of the United States. If such ship or vessel is in a district more than fifty miles distant from the one comprehending the port where the vessel ought to be deemed to belong — that is, where her new owner or the ship's husband resides — the collector of the district where the vessel may be is authorized and required to issue a new register, which is to be surrendered in like manner as provided in § 11, when his ship or vessel shall arrive in the port where she belongs, and a new register is to be issued in lieu thereof by the collector of the district in which such port is situated. So by § 13, if the certificate of registry of a ship is lost, mislaid or destroyed, a new one may be issued by the collector of the district where she may first be after such loss or destruction; to be surrendered in like

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manner as provided in previous sections, whenever the ship or vessel shall arrive in the port in which she belongs. And by § 14 it is provided that when any registered ship or vessel shall, in whole or in part, be sold or transferred to a citizen of the United States, or shall be altered in form or burden, she shall be registered anew in compliance with the foregoing provisions, that is, in the port where she may be at the time of such sale or alteration. A like provision is made by the U. S. St. of 1803, c. 18, § 3, in case of registered ships or vessels sold or transferred to citizens of the United States while without the limits thereof. In those cases, a new register is to be obtained from the collector of the district in which she shall first arrive after such sale or transfer within the limits of the United States. 2 U. S. Sts. at Large, 210.

Provisions of a similar character are made respecting the enrolment of vessels engaged in the coasting trade by the act of 1793, c. 46, with the following additional enactments: By §§ 7, 8, it is enacted that collectors may enrol and license any ship or vessel which has been registered, or register any ship or vessel which has been enrolled, on the surrender of the enrolment or license previously granted; and the exchanges thus authorized may be made by the collector of any district where the ship or vessel may happen to be, with a proviso that such register or enrolment shall be given up to the collector of the district where the ship or vessel belongs within ten days after her arrival in such district. 1 U. S. Sts. at Large, 305.

From these numerous provisions it is apparent that, while every ship or vessel of the United States has a home port, to which she legally belongs, or in which she has a domicil, it by no means follows that she is to be registered and enrolled at all times in the office of the collector of the district within which such home port is comprehended. When she is first built and is to be registered and enrolled in order to receive the document which is to give to her her national character, she is to be registered or enrolled in the district within which the port to which she belongs is included. So if, in the course of her voyages, she has occasion to change such original register or

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enrolment, and again arrives at the port of her domicil, such substituted register or enrolment is to be then surrendered and a new one taken out. But in all other cases for which provision is made in the statutes above cited, her register or enrolment is not to be made and issued at such home port or district, but in that one where she may happen to be when, according to the provisions of law, it becomes necessary or expedient to surrender her previous register or enrolment and take out a new one. If, for instance, a ship or vessel, or any part of her, is sold and transferred, a new register or enrolment is to be taken out in the district where she may be at the time of such sale and transfer, and this new register or enrolment continues to be her only register or enrolment until she returns to the district in which the port to which she belongs is comprehended, unless she is previously again sold and transferred, in which case another new register or enrolment is to be taken out in the district where she may happen to be, to be exchanged in like manner when she arrives at the port of her domicil. The result of these provisions, in their practical working, is that a ship or vessel may and often does change her register or enrolment many times in the course of her voyages, and continues to sail for years without returning to the port to which she belongs, and without having a register or enrolment in the district in which such port is comprehended.

The case at bar furnishes a good illustration of the practical operation of the provisions of the statute. The vessel in controversy was originally enrolled in her home port for the coasting trade on the 22d of November 1849. On the 12th of January following, she being then at New Orleans, a register was there taken out. From that date to the time when the vessel was attached by the defendant on the 20th of February 1856, for upwards of six years, she has been registered in various ports; but during all this time she has never returned to Camden, the port to which she is said to belong, and has never been registered in the district within which that port is included.

Under such a system of registration and enrolment it would seem to be reasonable and in many cases necessary that, in

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order to accomplish the great purpose which the statute requiring a record of mortgages and other conveyances of ships or vessels was intended to effect, the place of the record should be the district where the present existing register or enrolment of a ship or vessel is made. In no other way can a notice to all persons interested be made certain and effectual. A ship or vessel can have at the same time but one register or enrolment. It may be called either permanent or temporary; but, whatever is its nature, it constitutes for the time being the only document which gives to the vessel her legal *status* as an American vessel. The certificate of such registry or enrolment is not only in the nature of a passport which she always carries with her to show her national character, but, in a certain sense, it is also a muniment of title, which, by § 14 of the statute already cited, is to be inserted at length in any bill of sale of the vessel or any part of her, in order to entitle a purchaser to a new register or enrolment. It is therefore to this document, that purchasers, creditors and other persons interested to inquire into title would naturally look, as indicating her ownership at the time it was issued; and as it would always be readily accessible, it would afford an easy and certain means of ascertaining by an official certificate the place to which recourse should be had, in order to learn whether the ship or vessel is subject to any mortgage or hypothecation subsequent to its date.

This interpretation of the statute is not only consistent with its object and meets and satisfies it, so far as it is practicable to do so; but it seems to be the only construction which harmonizes with the natural and ordinary meaning of its language. The requisition is, that the record shall be made "where such vessel is registered and enrolled." It certainly would not be a compliance with this provision to put a mortgage on record in a district where a ship or vessel is not and never has been either registered or enrolled. Yet such would be the result, if the construction of the statute is that such record is to be made in all cases in the district where the ship or vessel belongs, without regard to the fact that the registry or certificate of enrolment in that district may have been long previously surrendered, and

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a substituted one taken out in a port where the vessel may have been, in compliance with the provisions of the statute already cited, and that in the mean time she has not returned to her port of domicil. We do not see how this conclusion can be avoided, unless it be said that a vessel may be registered or enrolled in two places at one and the same time. But for such a position we can see no warrant, either in the statute, or in the somewhat loose practice which has grown up under it in the course of nearly seventy years.

The construction for which the plaintiff contends, that the place of record under the statute is in all cases the district where the vessel belongs, is not merely unreasonable and inconsistent with the purpose and language of the statute; but in many cases a compliance with such a requisition would be wholly impracticable, and would make the statute inoperative. As has been already said, the requirement is clear and unequivocal that the record is to be made where the "ship or vessel is registered and enrolled." Now it not unfrequently happens that a ship is not and never has been registered or enrolled in the district to which she by law belongs. This may be so, not temporarily or for a brief time, but continuously and for many years. We have seen that in the case at bar the vessel in controversy had sailed for upwards of six years under a registry granted in another district than that to which she belonged, and although a registered vessel, she had never been registered in her home port.

But a stronger case than this often occurs. Take for example the case of a vessel which, after being built and duly registered or enrolled in the port to which she then belongs, is subsequently sold while in another port, within the limits of another district, to a citizen of the United States, whose residence is not in either of those two districts, but within the limits of a third. In such a case, the requisitions of the statute are clear and imperative, that the vessel is to be registered or enrolled anew in the district where she may happen to be at the time of such sale. She then ceases to have any legal registry or enrolment in the district to which she originally belonged. She has acquired none in the district where her owner or ship's husband

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resides, because the statute makes no provision for granting any to her, until she arrives within the limits of such district. The only registry or enrolment she can have is in the district in which she is at the time of her sale and transfer. And such registry or enrolment may continue for a long time to be the only one to which she is entitled. During this period of time where is a mortgage, sale, pledge or hypothecation of such vessel to be recorded? Not in the district to which the vessel belonged before the sale, because she is no longer there legally registered or enrolled; nor in the district within which the new owner or ship's husband resides, because until she arrives there she is not entitled to registry or enrolment in such district. The record in such case can be made only in one place conformably to the statute, and that is in the port or district where she was at the time of the sale and transfer, and in which her new registry or enrolment is by law to be made. Such would be the necessary result in every case where there was a change of ownership of a ship or vessel in a district other than that to which she belonged, or where there was a change of register or enrolment elsewhere than in the home port in any of the cases provided by statute, until the ship or vessel in the course of her voyages should arrive within the limits of the district where the port to which she belonged was situated. This she might not do at all or only after the lapse of many years.

The conclusion seems to be unavoidable, that in a large class of cases the statute, if construed as requiring a record of mortgages or other conveyances in the district to which a vessel belongs, would be wholly ineffectual and inoperative. But no such result would follow if the provision is interpreted as requiring a record where the present existing registry or enrolment of a ship or vessel is made. Such a requisition can at all times be complied with. It is a received and indisputable rule of exposition, that when there are two interpretations of which the language of a statute is susceptible, that one must be adopted which will give full force and effect to its provisions in all cases coming within its purview, to the exclusion of that construction which would render its operation only imperfect and partial.

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These views of the true interpretation of the statute under consideration derive some confirmation from the language used in the third section. It is there provided that the collector, when required, shall furnish any person a certificate of "the material facts of any existing bill of sale, mortgage, hypothecation or other incumbrance upon such vessel, recorded since the issuing of the last register or enrolment." 9 U. S. Sts. at Large, 441. This would seem to imply pretty strongly that the office whence the last register or enrolment was issued was the place intended for the record of such conveyances. Certainly such a provision would in many cases be inapplicable to the collector of the district where the vessel belonged. He would have no means of knowing when a vessel had last received her register or enrolment, if she had changed it, after leaving her home port, or had never been within the district to which she belonged, after her transfer to her present owners.

It was suggested by the counsel for the plaintiff that a register or enrolment taken out at a place other than in a district where a ship or vessel belonged was only "temporary," and that a "permanent" one could be had only in the port or district where a vessel may be said to be domiciled. We are aware that these words are in practice used in documents of this nature to designate the two kinds of registers or enrolments to which a vessel may be entitled. They were probably adopted as a matter of convenience to distinguish readily between the two, and also to remind the master or owner of the necessity of exchanging them when an exigency contemplated by the statute required it. But these terms are nowhere to be found in the enactments of congress, and as they were well known and in use when the *St.* of 1850, *c.* 27, was passed, it is reasonable to suppose that they would have been incorporated into it if it was intended that its provisions should be in any way affected or controlled by them.

It was also suggested that, as the register or enrolment of a vessel, whenever granted, always contained a statement of the port to which a vessel belonged, there would be no difficulty in ascertaining the place to which a purchaser or other person

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interested should look to see whether she was subject to a mortgage or other incumbrance. But the answer to this suggestion is, that the register or certificate of enrolment does not necessarily indicate the port to which a vessel may belong at any given time. It will show, it is true, where it was at the time it was issued, but not necessarily afterwards. The place of residence of the owners or ship's husband may change subsequently to the time when the register or certificate of enrolment was issued, and thus alter the port to which the vessel would legally belong. But the register or enrolment might still continue the same for a long period — as in the case at bar for upwards of five years — during which it might afford no correct information of the port to which the vessel belonged, or where she would be registered or enrolled, if she had happened to have arrived within its limits.

We are led by these considerations to the conclusion that the mortgage under which the plaintiff claims to hold the vessel was not duly recorded. It was put on record at Belfast, the district within which she belonged, but where she had never been registered, because she had not been within the limits of that district since the time when the register under which she was sailing at the date of the mortgage was issued. It was not put on record at Boston, where her last register was issued, under which she had been sailing for upwards of five years.

No question is made by the counsel for the plaintiff of the validity of the *St.* of 1850, *c.* 27, or the constitutional authority of congress to enact it. He has assumed it to be a valid and binding enactment. Taking it to be so, it follows that the plaintiff cannot claim title under the mortgage; because the act of congress expressly provides that no sale, mortgage, hypothecation or conveyance of a vessel or a part of it shall be valid against any other person than the grantor or mortgagor and persons having actual notice of it, unless it is recorded in the place designated by the statute.

There was no evidence at the trial of any actual notice to the defendant of the existence of the mortgage; nor are we able to see that there was any evidence on which the jury could have found a verdict in favor of the plaintiff on any of the grounds urged in his behalf. *Exceptions overruled.*

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Samuel Cabot & others, Executors, *vs.* Thomas C. Amory, Executor, & others.

Merchandise was shipped under an agreement between the shippers and the shipowner that it should be carried around Cape Horn or elsewhere for a market, and the net proceeds, deducting charges and master's commission on sales, invested in specie or bullion and shipped to the United States or Canton; if to Canton, to be invested in such goods as the shippers might direct, to be shipped to Boston, subject to a deduction of the usual charges, and on their arrival in Boston to be sold by auction, and, after deducting from the net proceeds the original cost and all charges except premiums of insurance and interest on the money, "the residue or profits to be equally divided between the shipper and shipowner." The ship went around Cape Horn, and the master sold the cargo in Chili and Peru for specie, part of which was forcibly taken from him by the government of Chili, then at war with Spain; and, being unable for want of funds to proceed to China at once, traded along the coast, and afterwards went to Canton, invested the remaining proceeds of the outward cargo and other funds in a cargo for Peru, went to Peru, and there sold it for specie, part of which he remitted to Boston, where it was distributed among the shippers, and the residue with the brig were seized and appropriated by the Chilian government, who many years afterwards, under treaty with the United States, paid about two thirds of the cost of the original cargo, with interest from the time of seizure. *Held*, that the owner of the ship was not entitled to any portion of the money paid by Chili, although, including the interest, it exceeded the original cost of the goods; nor of the money sent home by the captain from Peru, without proof of the terms upon which the goods were shipped from Canton to Peru.

Bill in equity, in the nature of a bill of interpleader, filed by the executors of the will of Thomas H. Perkins, for directions as to the distribution of a sum of money in their hands. The parties agreed upon the following facts:

In 1818 several merchants of Boston shipped separate invoices of merchandise on board the Brig Macedonian, then lying at Boston, and owned by John S. Ellery, under written contracts, annexed to the bill of lading, in these words:

"It is agreed between , shipper, and John S. Ellery, owner of the Brig Macedonian, that the merchandise, specified in the annexed bill of lading, amounting as per invoice to shall be carried in said vessel to one or more ports and places, round Cape Horn, or elsewhere for a market; and the net proceeds, after deducting all charges arising on said goods, and two and a half per cent. the captain's commission on the net sales, shall be invested in specie or bullion, and be shipped in said brig (or in case this vessel should be sold, in

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some other American vessel) to the United States or Canton; if to the latter place, it shall be invested in silks or nankins, of such description as the shipper may direct, and to be shipped to Boston, subject to a deduction of the usual charges in Canton, and two and a half per cent. commission to the master for investing the money, or to a deduction of one per cent. in case it is not invested and comes in specie or bullion to the United States direct. It is understood that if the proceeds should be shipped in any other vessel than the Macedonian, the freight is to be paid by the owner of said brig.

"On the arrival of the said goods in Boston, they are to be sold at auction, and the net proceeds, after deducting the duties and all other charges arising on said goods, excepting premium of insurance and interest of the money, are to be divided as follows: the original cost of the goods to be deducted from the net proceeds, and the residue, or profits, to be equally divided between the shipper and shipowner, and in like manner if in specie and bullion, which is to be in full for the freight during the whole voyage.

"In case the vessel is sold, the captain will continue with the property until it is shipped for the United States; and it is understood the owner is not liable for his conduct; and that the property is at the risk of the shipper, the voyage round. Dated at Boston, January 26th, 1818."

The brig sailed from Boston on the 5th of February 1818, and, after selling part of her cargo at Coquimbo and Valparaiso in Chili, went to Callao in Peru, and there sold and delivered the rest of the cargo in October 1818 to some Spanish merchants for the sum of $145,000 in specie, which was forcibly taken from the captain by the admiral of Chili, then at war with Spain. After this seizure, the captain, being prevented by want of funds from directly pursuing the contemplated voyage to China, employed the vessel in several coastwise voyages in South America; but afterwards proceeded to China, and, with the proceeds of the original outward cargo, and other funds, purchased Chinese merchandise, which was shipped in a single invoice in the name of "John S. Ellery and others;" and with

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this, and other merchandise shipped by other merchants at Canton on their own account, returned to Peru, and there sold the greater part of the cargo, and remitted a portion of the proceeds arising from the sale of this invoice of Ellery and others in specie to Boston, where it was distributed among the original shippers, according to the amount of their respective invoices; but the balance of the proceeds of the cargo there sold, amounting to $70,000, and the goods remaining unsold, were again seized, together with the brig, by the Chilian government, and converted to its use, and the brig never returned to the United States.

These seizures constituted just claims against the government of Chili, which, after many years of negotiation between it and the United States, were finally compromised by agreeing that Chili should pay for the first seizure of $145,000 the sum of $104,000, with interest at five per cent. per annum from the time of the seizure to the time of payment, in seven annual instalments.

Perkins, being personally interested in the matter as one of the shippers, was appointed by Ellery and the other shippers their common agent to prosecute the claim against Chili and receive and distribute the proceeds, and by his verbal agreement with Ellery was to receive a commission in compensation for his services. He received in 1843–1845 from the Chilian government the first three instalments, and, after deducting all charges and expenses, and his own commission, and carrying to general account a certain sum to meet contingent expenses, accounted for and distributed the balance to and among the original shippers in proportion to their respective invoices. In 1846–1849 he received the remaining instalments from the Chilian government, which have never been distributed, but are now in the hands of the executors of his will, whose account shows a balance to be distributed of $134,378.19.

No freight, or other compensation in lieu thereof, has ever been paid to Ellery by any of the shippers; and his disbursements on account of the brig, from the time she left Boston until she was seized in Peru, amounted to over $70,000.

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The executors of Ellery's will received a certain sum as an indemnity for the seizures made by Chili, and distributed the same among the original shippers, according to their respective original invoices, and these shippers have already received back the amounts of their original invoices.

By agreement of parties, this cause was "referred to Charles G. Loring, Esq., as auditor, to report the facts, with his decisions thereon," who made a report, to which the surviving executor of Ellery's will excepted, and so much of which as concerned his exceptions was as follows:

"The question whether Ellery is entitled to receive one half part of the surplus of the amounts that shall be adjudged payable to the shippers, above those at which their goods were invoiced, or any other compensation for the use of his vessel on either passage, presents great difficulties.

"In order to its intelligent discussion, it may be desirable to determine, in the first place, the relations of the parties under the contract contained in the bills of lading and the agreements thereto annexed. The undersigned is of opinion that by these the master was made the consignee or agent of the owners of the goods, so far as the safe custody and proper disposal of them, and the accounting for, and remittances or investment of the proceeds of them, were concerned; and the shipowner was thus exonerated from some of the liabilities under which he would have remained upon a mere bill of lading; but that the master continued the agent of the shipowner, for the due prosecution of the voyage described, insomuch, at least, that any voluntary departure from it was at his risk, at the least so far as his interest in the prosecution of it was involved; and so that any voluntary abandonment of it, or the inception of a new one, however consented to by the master as agent of the shippers, could give to him no rights of indemnity, or vest in him any other claims against them by reason of such abandonment.

"In the next place, it may be well, if possible, to define and determine the true meaning of the clause in which the compensation to the shipowner in lieu of freight was provided for, and what that compensation was to be.

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"And first, it is manifest that none was to become due, or be the subject of any admeasurement, until after the arrival in Boston of the proceeds of the goods, whether in specie or in bullion, or invested in other merchandise. By the explicit terms and the nature of the contract the compensation was incapable of subdivision; and was dependent upon the hazard of profit or loss upon the adventure throughout its whole accomplishment; and was susceptible of no other adjustment than by the relation which the proceeds, thus returned to Boston, should bear to the cost of the goods at their place of departure. So that if the goods, or their proceeds, should have been lost at any point of the whole voyage, intermediate between that of its inception and that of its stipulated termination, even at the wharf in Boston before opportunity for unlading, no reward would have become due for the part performed. And no voluntary departure or abandonment, at any such intermediate point of its prosecution, could confer upon the shipowner any rights or claims to which he would have been entitled upon its accomplishment, whatever new ones might arise upon a variation of the enterprise, or upon entering on a new one; for if the owner should be considered exempt from liability to the shippers for such departure or abandonment by the master, under the clause exempting him from liability for the master's conduct, (which is by no means clear, inasmuch as that clause may be construed as confined to an exemption from liability for the master's unfaithful custody or disposal only of the goods,) it is quite manifest that the master had no authority to bind them to any contract for another voyage, or to the fulfilment of the terms of the old one upon the substitution of another undertaking; but that the relative rights and obligations of the parties would have to be determined according to the nature of the new enterprise, and upon proof of their subsequent ratification of it, there having been no precedent authority.

"It may be worth while also to observe that the compensation stipulated for in the agreement was one half of the surplus of 'the net proceeds,' which is described as 'the residue or profits,' in terms therefore excluding other sources of it, and to

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be construed according to their ordinary acceptation in mercantile dealings.

"It becomes necessary then, under the guidance of these principles, to ascertain whether the funds in Perkins's hands, with interest computed as above prescribed, or any portion of them, are justly to be accounted profits upon the invoices of goods shipped at Boston, accruing on the voyage stipulated in the bills of lading and contracts annexed. It is obvious that the voyage itself was never performed. The one agreed upon was from Boston to South America, whence the proceeds were to be invested in specie and bullion, to be brought in the brig, or sent back, in the event of a sale of her, to Boston; or to be sent to Canton for investment, and thence shipped to Boston, where they were to be sold, and the net proceeds, after deducting the invoice costs, were to constitute 'the profits' to be divided between the owner and the shippers.

"But this enterprise was broken up and frustrated, at the port of outward destination, by the forcible seizure of nearly the whole proceeds of the sales of the goods invoiced, by the Chilian government; so that such proceeds could neither be sent to Boston or Canton, nor invested there and returned to Boston, pursuant to the contract; and so that any possibility of ascertaining any profits, by the only test and mode of determination prescribed by it, was utterly defeated. And the vessel, after prosecuting several intermediate voyages occupying the best part of a year, for the sole account and benefit of her owner. proceeded to Canton with another cargo, including a portion only of the proceeds of these sales, and which upon this statement must have been a small one only; and under relations to other shippers, and with an intended termination of the voyage in Peru, which render it impossible to consider it any continuation of that originally undertaken. Inasmuch therefore as the voyage, the performance of which was to be precedent to the existence of the profits stipulated for, and the only test, or mode of ascertaining any, became impracticable, it seems to follow that no such profits can be considered as having accrued, constituting or represented by any portion of the funds in the hands of Per-

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kins; they being derived solely and exclusively from the indemnity paid by the Chilian government from the seizure and confiscation of a part of the proceeds of the sales of the outward cargo.

"It was argued however that, although the particular voyage was not completed, nevertheless this portion of it to South America was performed; and the parties, having accepted the proceeds of the sales made in South America, as paid over by the Chilian government, have so far ratified and confirmed the proceedings of the master, or consented to the abandonment of the voyage, and so have become liable *ex æquo et bono* to compensate the owner, *pro rata itineris*, for such part performance of the contract.

"It seems to the undersigned however, that so far as any claim for a *pro rata* compensation may be supposed to rest upon an implied abandonment of the voyage, or consent to such abandonment on the part of the shippers, it would be enough to say, that it could not be considered as one made by the shippers, any more than by the owner; the master being in that respect, if an authorized agent of the shippers, at least equally one of the owners; and a mutual abandonment could give neither any rights under the contract. But it seems impossible to consider these proceedings in any such light. There was no voluntary abandonment on either side, but a forcible disruption of their contract; nor was there any acceptance by the shippers of the proceeds of their goods as in part fulfilment or furtherance or continuation of the voyage. For if the moneys received from the Chilian government could by any stretch of reasoning or imagination be considered as the proceeds of the cargo, they were never received there as such, for the purposes of the original enterprise; and the payment of them from twenty nine to thirty five years afterwards, as an indemnity for a confessedly criminal violence committed upon neutral property, can hardly be accounted as delivery over of the proceeds in kind, or by way of substitution. Besides, they never were received by the master there, but were paid here under treaty with our government; and the principal sum paid fell far short of the actual amount

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seized, and of the invoice cost of the goods. Nor can this be considered a case where, although the contract was not entirely fulfilled, an equitable claim arose from a benefit derived from a partial performance; for, although the goods appear on this statement to have been sold and delivered there at a profit upon the investment, yet the proceeds were seized and became totally lost; so that no benefit, but ruin, so far as that voyage was involved, was the immediate result of such part fulfilment of the contract. Nor may it, as the undersigned thinks, be reasonably contended, that as a profit was made upon the sale of the outward cargo, and a partial indemnity has been awarded for the loss, justice requires an apportionment of the indemnity between all entitled to share in the profits and to reimbursement of the invoice value of the goods; for the only profits contemplated by the contract were those to be realized upon the termination of the voyage in Boston; and as those profits, if they can be so called in this discussion, became lost in Chili and never reached Boston, they cannot be esteemed as falling within the scope of the contract.

"But it is claimed, and has been argued with great ingenuity, that inasmuch as the total amount finally received from the Chilian government exceeds very considerably the invoice cost, and was paid in specie or bullion, the surplus over such cost is to be accounted profits, within the fair meaning of the contract, although the greater portion of it consists of interest paid from the time of the seizure; and that the gross amount paid is to be considered the proceeds of the goods, and as thus paid by instalments.

"If such amalgamation of principal and interest, under any circumstances, could be esteemed reasonable, the undersigned would still find insuperable difficulties in accounting the excess so received as profits of the voyage, within the contract under consideration. The facts would still remain that the voyage was never completed, but forcibly broken up; and that therefore neither party could claim of the other as for its fulfilment; and that, whatever name might be given to the moneys thus paid and received, the shippers could not be considered as having

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made any profits on the voyage, inasmuch as the total amount received would not be a reimbursement of the cost of the goods, allowing much less than legal rate of interest from the time of its termination by the seizure in Chili; so that they are greatly losers, although the whole amount paid at the expiration of thirty five years does exceed the original sums charged in the invoices, without interest thereupon. But the undersigned is entirely satisfied that, in deciding the question whether there were or were not any profits to be divided, it cannot be that the interest and principal are to be thus amalgamated, and so make the voyage to continue constructively for the space of thirty five years; which is essential to this hypothesis.

"The voyage upon which the parties entered was finally and fatally terminated, so far as this portion of the adventure was concerned, at the time of the seizure of these proceeds; and they never were specifically restored, nor pretended to be. The rights of all the parties became at that moment fixed, *inter sese*, and as against the Chilian government, so far as the voyage agreed upon was concerned, its further prosecution having become impossible. Any indemnity, therefore, that became lawfully or equitably due from the seizors to any of the parties, became due to them then, and was to be accounted as payable then; and all compensation, subsequently becoming due for the neglect or omission or refusal of payment at that time, accrued to those entitled to such payment, as a mere indemnity for such neglect, omission or refusal. The interest was to be in no sense any part of the indemnity for the seizure, but only for the detention or omission to pay the money due for such seizure; and belonging to those only who had become entitled to it by reason of the seizure. If the one hundred and four thousand dollars had been paid forthwith, there could have been no pretence of any profits to be divided, for such indemnity would have fallen short of the cost in Boston; and it is impossible to consider the interest allowed for withholding the indemnity admitted to have been due then, as profits on such cost. Such an appropriation of the interest would be to aggravate the loss caused by the seizure, by depriving the shippers of a very large portion of the already insufficient indemnity allowed.

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"Upon every view, therefore, which the undersigned has been enabled to take of this part of the case, he is of opinion and does therefore find and report that no portion of the funds received by Perkins, or now in the hands of the executors of his will, can be accounted profits, to be the subject of division between Ellery and the shippers.

"The remaining questions touching the amounts received and distributed by Ellery, being those paid by the Peruvian and Chilian governments on account of the seizure of the proceeds of a portion of the return cargo from Canton, and of such of the goods as were unsold, are attended with much greater difficulties, if not such as to render any satisfactory solution of them upon this evidence impossible, otherwise than by the application of the technical rules of law regulating the burden of proof. For the reasons above stated, and the fact that the voyage from Peru to Canton and back to Peru to terminate there was entirely inconsistent with that originally agreed upon, and that the terms upon which it was undertaken, as between the shipowner and the shippers, and between the shippers themselves, are entirely undisclosed, it must be considered an entirely new voyage, in which the master, without any authority, invested a portion of the funds belonging to the shippers of the original cargo in Boston; though what portion, and how obtained, seems upon this evidence to be wholly unknown. We have no light therefore to guide us from the original contract. It is quite clear that this procedure on the part of the master, being wholly unauthorized, and not appearing to be dictated by any necessity, (there being no apparent difficulty in transmitting his funds saved from seizure in Peru to the owners in Boston,) and there being no warrant for investing them in further speculations between Canton and Peru, might have been repudiated by the shippers, who would thereby have become exonerated from any liability to the shipowner or the master, and entitled to claim of him full indemnity for all losses thus occasioned. And it might, under other circumstances, have become a question how far their receipt of the proceeds thus remitted and distributed would have been a ratification of his acts. But that

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question, in the present aspect of the case, becomes immaterial, because, independently of other considerations, upon the only evidence before the auditor, there are no acts or relations known to which any such ratification, if existing, could attach. It is not known whether the shipments to Canton and back to Peru were on freight or half profits, under a charter, or under any stipulated arbitrary relations of value between the various interests involved in the voyage; and therefore it is impossible to say what was thus ratified, if anything was. Nor is it known whether any, or if any, what indemnity was paid to Ellery for the seizure of his vessel, or the loss of freight, or of the profits of his voyage — all which were subjects of claim, and may have been, and, it may be supposed, were probably allowed with that for the loss of the goods.

"All that is known from this statement is that some funds belonging to these shippers were sent in this vessel to Canton and invested there, and, thus invested, were brought back to Peru; and that a portion of the proceeds of the sales there was remitted to the executors of Ellery's will and distributed by them; and that a portion of the proceeds of sales in Peru and the goods remaining unsold were also seized and confiscated; and that indemnity to greater or less extent has been received by the executors of Ellery's will, and distributed among the shippers, in the ratio of their invoices, in instalments from 1843 to 1849.

"As the shippers have thus received the proceeds of the investments made by the master on their account in Canton, (although under circumstances that may well raise doubts whether such receipt could be accounted a ratification of his doings thus wholly unknown to them, or anything more than the plucking of so much salvage from the wreck;) and as Ellery had thus performed a long voyage at necessarily great expense, there might seem to be some equitable claim on the part of his executors for freight or compensation to be paid by the shippers, if this were all that is or can be known; though even then, as a legal question, the entire want of any evidence as to the nature of the voyage, whether upon a share of profits or otherwise,

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and if upon profits, whether any were earned; or whether freight, if any was due, had not been deducted by the master in Canton, or on arrival at Peru; or whether the owner was not indemnified for the loss of his freight, or the emolument of his voyage consequent upon the confiscation of his vessel, (for which he was indemnified, in greater or less degree, as appears by the evidence,) as seems most probable, as such loss of freight or emolument constituted a claim equally meritorious with all others; would render it difficult, if not impossible, for any tribunal to render any satisfactory judgment in favor of such claim.

"Beside this, the executors, or those who transmitted or paid this money to them, must be presumed to have known or to have had means of knowing on what account it was paid, and what indemnity, if any, had been allowed of the nature above suggested; and it is not to be presumed that they would have paid over these sums to the shippers, if they were not satisfied that it belonged to them, or that their testator had any just claims to any part of it.

"It may be thought that the suggestion, that it is not known whether the master may not have deducted freight at Canton, or in Peru, is inconsistent with the last clause but one in the printed statement that 'no freight or other compensation in lieu thereof has ever been paid to Ellery by any of the shippers.' It is considered, however, that this clause must be interpreted as a mere statement that none had been paid by them personally, or by their knowledge; the confessedly total ignorance of all parties, upon all that took place abroad, would preclude the interpretation of an intended admission that none could have been, or that it was known that none had been so deducted or received. But if the clause were to be so construed, the other difficulties in the way of the legal adjudication of any specific amount as due would not be the less insuperable.

"In this state of the evidence, it is manifestly impracticable to determine the question concerning this claim for compensation satisfactorily, otherwise than by the application of the rules of law regulating the burden of proof. On that ground the

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undersigned is constrained to find and to report that the claim is not sustained by the proof; but it is one which he thinks may reasonably be the subject of friendly compromise, if further satisfactory evidence be unattainable."

W. Minot, Jr., for Ellery's executor. The contract annexed to the bills of lading was not for freight, but defined a commercial partnership adventure, enterprising and hazardous in its character, and uncertain in duration, between the shippers and shipowner. Each party contributed his capital; interest and freight were not to be charged, but were to be merged in the profits, or surplus; this surplus was to be equally divided, and each party shared in the risk of detention, or loss. The adventure was crippled, and finally prematurely terminated, by the default of neither party, but by a *vis major*, an illegal capture. If this misfortune is chargeable as any breach of the contract or cause of variation, the fault lies with the shippers, who failed to provide a cargo or funds for the continuation of the voyage. The cargo was seized, but the vessel did proceed on the voyage. The seizure by Chili of the $145,000 was after the adventure had so far advanced that the interest and property of the parties had become intermingled, and their rights to the proceeds had become joint and indissoluble. After the first seizure, the voyage was still carried out, by the common agent of the parties, according to his honest judgment, under the unforeseen contingency of the seizure; and the doings of the agent have been accepted and ratified by the shippers, by their acceptance of the proceeds of the Canton voyage, and they are now estopped to say that the voyage was broken up by the first seizure. It must be admitted that some freight was earned, for the outward cargo was safely delivered and the proceeds received, and so of a portion of the Canton cargo. The only just and reliable measure of that freight is the half profits; the measure stipulated by the parties, they expressly excluding time and interest. No freight or other compensation has been paid to Ellery, who has expended $70,000 in prosecuting the voyage; the shippers have received a large surplus, which has been earned through Ellery, and by the use of his property; they agreed to charge

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no interest during the voyage, and divide the surplus; now they charge interest, refuse to divide the surplus, and propose to pay nothing for the carriage of their goods.

The $145,000 seized included profits which belonged to Ellery, and of which he had the right of possession. The indemnity, therefore, should be equitably apportioned to him, as one among the parties injured. It is a fund to be distributed equitably, according to the rights and interests of all the parties at the time of the seizure. *Appleton* v. *Crowninshield*, 8 Mass. 358. *Heard* v. *Bradford*, 4 Mass. 326. *The Friends*, Edw. Adm. 246. *Baillie* v. *Modigliani*, Park on Ins. (7th ed.) 90.

The fact that the indemnity paid by Chili was in form of $104,000 and five per cent. interest, by way of compromise and to facilitate a settlement, cannot vary the rights of the claimants *inter se*. All that was received, to the extent of the $145,000, was the proceeds of the goods sold, and should be so treated. If this form of settlement excludes half profits, then the shippers charge interest, which, by the contract, they were not to do; and they get, for their share, compensation for the detention of their capital, when it was agreed that none should be charged. Suppose the vessel and cargo had been illegally detained, on the homeward voyage, for ten years, the shippers could not have charged interest. How then can they appropriate interest paid for detention of cargo? The whole indemnity was paid as damages. Ellery was damaged as much as the shippers. The seizure and detention crippled the voyage in which he was largely interested as shipowner, and kept the property from his business as well as from that of the shippers.

The interest paid by Chili was in fact profits earned by Ellery on the outward voyage; the shippers' goods never could have been worth the $145,000, (their invoice in Boston being $105,000,) unless Ellery had transported them to Chili; and he earned the difference between the invoice in Boston and the sale in Chili, one half of which, by the contract, was to be his; so that the shippers' claim against Chili was in fact but for $125,000, and Ellery's claim was for the balance, $20,000.

If Ellery is not entitled to half profits, still he is entitled to

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pro rata freight. The outward cargo was duly delivered and the proceeds received by the consignee of the shippers. This was an acceptance of the goods, and freight was therefore due.

The cargo only having been seized and confiscated, and the vessel not seized, but ready and able to perform her voyage, freight is due, on the principle that when capture attaches to the cargo, and not to the vessel, full freight is due. *The Racehorse*, 3 Rob. Adm. 101, & note. Abbott on Shipping, (7th ed.) 406, 471, & notes. 1 Kent Com. (6th ed.) 125. *The Société*, 9 Cranch, 209. *The Antonia Johanna*, 1 Wheat. 169. The shippers have also accepted the delivery of the outward cargo, by receiving a portion of the proceeds thereof, invested in the Canton voyage and cargo.

If the voyage was broken up by the first seizure, Ellery is entitled to freight to Callao, because the outward cargo was sold and delivered, and the price thereof received by the shippers through the Chilian government. If the voyage was continued, and the shippers elect so to consider it, then if half profits are not due, freight could be recovered in assumpsit; for the authority which continued the voyage was sufficient to imply an obligation to pay freight.

Freight is clearly due on the Canton cargo, or a part of it at least; for that was carried to its destination, sold, and the proceeds duly remitted to Boston, and divided among the owners of the cargo.

F. C. Loring, for the other defendants and the plaintiffs.

By the Court. The reasons for the results reached by the auditor, to which exceptions are taken, are so fully and carefully stated in his report, that it is sufficient to refer to the report itself as a statement of the grounds and reasons upon which the exceptions are overruled. *Decree accordingly.*

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William Thwing *vs.* Washington Insurance Company.

A letter from the master of a ship to the owner, stating that she had been surveyed and condemned on account of the expense of repairs, but not stating the cause of her injuries, was sent by the owner to the underwriters with a letter of abandonment, which they declined to accept. The owner afterwards, within thirty days after receiving the master's letter, and immediately after the master's return, called with the master upon the underwriters, exhibited to them the protest and the survey, and claimed a total loss. The protest stated that the vessel met with strong breezes and a heavy sea, and was with difficulty pumped free of water, and, the leak continuing the same, anchored; and the survey declared that she was incapable of proceeding to sea unless recalked and recoppered, and that the cost of repairs with incidental charges would exceed her value. *Held*, that the abandonment was sufficient.

Under a policy of insurance on freight from Boston to San Francisco, and thence to port or ports in the East Indies and to a port of discharge in the United States, with liberty to return with a cargo of guano from the Chincha Islands instead of the East Indies, freight earned on the outward voyage is not to be deducted from the valuation in the policy, in computing a constructive total loss of freight on the passage from the Chincha Islands home.

The condemnation and sale of a ship at an intermediate port, in consequence of damages sustained by perils insured against, entitle the owner to abandon and claim for a total loss of the freight, although the cargo has been carried to its destination in another vessel for a price equal to the freight which would have been paid if the original ship had completed her voyage and delivered her cargo and the stipulated freight has been paid by the consignees.

Action of contract upon a policy of insurance, numbered 11,927, for "five thousand dollars on the Ship Carolus, five thousand dollars on the freight of said ship, on board or not, from Boston to San Francisco, and at and thence to port or ports in East Indies or east of the Cape of Good Hope, with liberty to stop at Honolulu, and at and thence to port of discharge in the United States or Europe," at a premium of five per cent., "to add one fourth per cent. for each port used more than one in the East Indies, and one per cent. for North Sea from October 1st to March 1st." This indorsement was afterwards made on the policy: "Liberty is given for the within voyage to be changed so that the ship may return with a guano cargo from the Chincha Islands instead of the East Indies." The vessel and freight were each valued in the policy at $25,000. Trial before *Merrick*, J., who made the following report thereof:

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The vessel delivered her cargo at San Francisco on the outward voyage, and made freight to the amount of $23,238.80. On the homeward voyage from the Chincha Islands, she put in a leaky condition into Callao (which she was obliged to visit to obtain a clearance), was surveyed and condemned, and was sold by the master. The cargo was transhipped for the port of delivery for a freight of $17,000 or $18,000, equal to that which the plaintiff was to have received.

After the introduction by the plaintiff of some evidence of the amount and possibility of repairs necessary to make the ship seaworthy, the defendants admitted that the plaintiff was to recover, if anything, for a total loss of the ship.

As evidence of an abandonment the plaintiff offered a letter from himself to the defendants, inclosing one from the master to him, and the defendants' answer, all three of which are copied in the margin;* also the testimony of the master that on his

* "Callao, November 10, 1853.

"Mr. William Thwing. Dear Sir, I write to inform you that I am now nearly discharged, shall finish on Saturday next the 12th inst. and will say to you that another survey has been held on the Ship Carolus of Boston, and the report is as follows: that the ship must be hove out, stripped of her copper, and caulked from garboard to decks, and coppered anew and refastened nearly all over; and an estimate of the repairs has been called for and handed in to me, and it amounts to nearly $17,000 in this place to make the ship fit to take a cargo home; should we find anything more when hove down, it will make an expensive bill of repairs. I have consulted the insurance agent and other experienced shipmasters here, and all are of the opinion that it will be best for all concerned to sell the ship at public auction. Therefore they have condemned the ship, and it will be sold on Wednesday the 16th inst. at public auction, for the benefit of whom it may concern, and I shall close all business here as fast as possible, and hasten to see you in Boston by the earliest opportunity. I have not heard from you since I left San Francisco. I have had a hard time of it in this ship.

"Respectfully yours, Luther Hurd."

"Boston, December 13, 1853.

"Isaac Sweetser, Esq., President Washington Ins. Co. Dear Sir, By a letter from Captain Hurd of the 10th November last, which I now exhibit, you will see that the Ship Carolus has been condemned, and was to be sold at Callao. I therefore am constrained to abandon said vessel and her freight to your com-

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return to the United States, and between the 10th and 12th of January 1854, he went with the plaintiff to the office of the defendants, exhibited to them the protest and survey, and claimed a total loss.

The protest stated that the vessel, at the time of sailing from the Chincha Islands for Callao on the 8th of October 1853, "was tight, stanch and strong, well manned, provisioned and provided with everything necessary for the said voyage, and on the following day at 4 P. M. experienced strong breezes and a heavy sea; at 8 P. M. they started the pumps, and, finding that they did not free the ship, they sounded the well at 8 h. 20 min. and found twenty six inches of water still in her; all hands were then turned to the pumps, and at 10 h. 30 min. they succeeded in freeing her, and afterwards one pump, kept going, kept her so; that on the 10th the leak continued the same, and at 2 P. M. of the 11th they anchored the vessel in Callao Bay."

The surveyors reported "that the ship is still leaking badly, though in light ballast and at anchor in smooth water; that she is much strained, and has worked in her whole frame. We are therefore of the opinion that she is incapable of proceeding to sea, unless she be hove down and recaulked and recoppered; nor do we believe she can receive cargo with safety, unless extensively refastened both below and between decks. We are also of the opinion, taking into consideration the age and general condition of the vessel, that, even with the repairs named, it would be hazardous to load with guano to an extent beyond her register tonnage. And in view of all the above circumstances, and the excessive cost of repairing her, as is shown by

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pany, so far as they are covered by policy No. 11,927, and give you notice that I claim payment of a total loss.

"Respectfully, William Thwing."

"Office of Washington Insurance Co. Boston, December 14, 1853

"Wm. Thwing, Esq. Dear Sir, Your letter of 13th inst., tendering an abandonment of so much of Ship Carolus and her freight as are insured by our policy No. 11,927, is received, but the abandonment is not accepted.

"Yrs very respectfully, Isaac Sweetser."

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the carpenter's estimate annexed, amounting to $12,725, we are of the further opinion that the said cost of repairs, together with such other charges of commissions and marine premiums as must accrue thereon, would exceed her value, and that she ought to be condemned and sold."

The presiding judge instructed the jury that on the evidence they could find that a sufficient abandonment had been made; and that if they found for a total loss of the ship, the plaintiff was entitled to recover for a total loss of the freight, the amount of the valuation. To these rulings the defendants excepted.

The jury found for a total loss, and rendered a verdict for the amount insured on the freight, and for the amount insured on the ship, less the salvage received on the proceeds of the sale. And the parties agreed that, if by reason of any error in the foregoing rulings the amount of the verdict ought to be changed, the case should be sent to an assessor to reform the verdict under instructions from the court.

F. C. Loring & J. Lathrop, for the defendants. 1. The loss not being actually total, a sufficient abandonment was necessary to render the defendants liable for a constructive total loss And the abandonment acquires new importance under the recent decisions of this court, making it in effect the proximate cause of the liability of underwriters who have insured against total loss only. *Heebner* v. *Eagle Ins. Co. ante*, 131. *Kettell* v. *Alliance Ins. Co. ante*, 144.

To an abandonment, whether written or oral, two things at least are necessary; it must be sufficient, if accepted, to transfer the property to the insurers; and it must state a loss by a peril insured against.

In this case, the plaintiff's letter of abandonment stated only that the vessel had been condemned and was to be sold — which might have been on the libel of a material man in admiralty, or for being engaged in the slave trade, or any breach of the revenue laws, or any one of divers other causes. As the sale of a vessel *per se* gives no right of abandonment, *a fortiori* the condemnation does not, and the mention of the mere fact of condemnation is insufficient, and no statement of the cause of the

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loss. The master's letter, inclosed in the plaintiff's, shows that the cause of condemnation was need of repairs; but not that perils of the sea were the cause of her being out of repair. *Bullard* v. *Roger Williams Ins. Co.* 1 Curt. C. C. 152. *Peirce* v. *Ocean Ins. Co.* 18 Pick. 93. *Suydam* v. *Marine Ins. Co.* 1 Johns. 181. *Dickey* v. *New York Ins. Co.* 4 Cow. 222. *King* v. *Delaware Ins. Co.* 2 Wash. C. C. 300. The documents handed to the defendants a month after the abandonment cannot be referred to for the purpose of supplying its deficiencies. And neither the protest nor the survey, if referred to, show anything more than a leak and need of repairs; they do not show that the leak was caused by a peril insured against.

The case of *Heebner* v. *Eagle Ins. Co. ante*, 131, is within the exception that if the assured, at the time of abandonment, refers to information which he has received, the abandonment is not invalidated by omitting to mention the peril which caused the loss, because the underwriters can call for this information before deciding whether to accept the abandonment; and this is the only ground upon which that case can be reconciled with the previous decisions. *Peirce* v. *Ocean Ins. Co.* 18 Pick. 93. *Macy* v. *Whaling Ins. Co.* 9 Met. 354.

2. There has been no total loss of freight. The voyage insured, from Boston to San Francisco, and to return from the Chincha Islands with a cargo of guano to the United States, was a round voyage, and the defendants, if liable at all, are only liable for the difference between the valuation and the amount earned on the outward voyage. Emerigon on Insurance, c. 17, sect. 9; (Meredith's ed.) 708. *Adams* v. *Pennsylvania Ins. Co.* 1 Rawle, 97. The leading cases in favor of considering voyages as distinct were decided on the ground that the premium was double; which is not the case here. *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 610. *Davy* v. *Hallett*, 3 Caines, 16. Under a charter party, a voyage similar to that described in this policy, for which a gross sum was to be paid as freight, would be an entire voyage. *Towle* v. *Kettell*, 5 Cush. 18, & cases cited.

3. Admitting the voyages to be distinct, there has been no

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loss of freight on the homeward voyage. If the vessel was not constructively a total loss, it is clear that the freight was not lost. *Jordan* v. *Warren Ins. Co.* 1 Story R. 342. *McGaw* v. *Ocean Ins. Co.* 23 Pick. 405. *Lord* v. *Neptune Ins. Co. ante*, 109.

Even a loss of the vessel at an intermediate port, which is actually total in its nature, or which is rendered total by abandonment, does not necessarily constitute a total loss of the freight. The rights, duties and responsibilities of the different classes of underwriters are distinct in their nature, and are not to be confounded in determining their respective liabilities; and it makes no difference in this respect that the same parties insured both ship and freight. *Benson* v. *Chapman*, 2 H. L. Cas. 696. *Scottish Marine Ins. Co.* v. *Turner*, 4 H. L. Cas. 312, note. *Lord* v. *Neptune Ins. Co. ante*, 121, 122. *Fiedler* v. *New York Ins. Co.* 6 Duer, 282.

That a constructive total loss of the ship does not necessarily involve a total loss of freight is evident from the fact that the ship may nevertheless earn freight. An abandonment of the ship would transfer to the underwriters the right to the freight, just as a sale would transfer pending freight; but neither could create a liability.

In England, a total loss of the vessel at an intermediate port may perhaps be a total loss of the freight, because the master seems not to be obliged to send the goods on. *Shipton* v. *Thornton*, 9 Ad. & El. 338. *Gibbs* v. *Grey*, 2 H. & N. 22. But in the United States, the law is well settled that the loss of the ship at an intermediate port does not draw after it, as a necessary consequence, the loss of the freight; but it is the duty of the master to send the goods on in another vessel. *Schieffelin* v. *New York Ins. Co.* 9 Johns. 21. *Bryant* v. *Commonwealth Ins. Co.* 6 Pick. 131. *Robinson* v. *Commercial Ins. Co.* 3 Sumner, 220. And if the goods are forwarded at an increased freight, their owner is liable therefor. *Searle* v. *Scovell*, 4 Johns. Ch. 218. *Mumford* v. *Commercial Ins. Co.* 5 Johns. 262.

The same principle applies to an underwriter on freight. He is not liable, although the ship be lost at an intermediate port, if the goods can be sent forward so as to arrive *in specie* and

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earn freight. The expense of sending them on in another ship, so far as it is greater than the freight agreed on, is a charge upon the owner of the goods. If the expense is the same, it is not a charge upon the underwriter on freight; his contract being merely that the goods shall arrive and freight be earned, not that there shall be any profit. 1 Arnould on Ins. § 79. 2 Arnould on Ins. § 397. *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 595. *Bradhurst* v. *Columbian Ins. Co.* 9 Johns. 17. *Ogden* v. *General Mutual Ins. Co.* 2 Duer, 215.

If the master is not bound, he has the unquestionable right, to forward the cargo by another vessel and earn the freight. Ordonnance de la Marine, lib. 3, tit. 3, art. 11. Pothier, Charte Partie, § 68. 2 Boulay Paty, Droit Commercial, tit. 8, § 8. Abbott on Shipping, (7th ed.) 365. If the master then sends on the goods, he does it on the original contract, and the owners of the goods are bound to pay the original freight, though this be more than the freight by the substituted ship. *Shipton* v. *Thornton*, 9 Ad. & El. 338. *Rosetto* v. *Gurney*, 11 C. B. 176. 3 Kent Com. (6th ed.) 228, 229.

If the vessel is disabled at an intermediate port, the master has a right to require payment of freight *pro rata*, or to forward the cargo and earn freight, if practicable; and his election to abandon the voyage and surrender his claim for freight should not throw a loss upon the underwriters, for which they would not be liable if he chose to forward the cargo. Here the master did send on the cargo in another vessel at the same rate of freight, which the plaintiff has received, and has therefore sustained no loss.

It is true that the shipowner pays another vessel the price which he was to receive for carrying in his own vessel; but that does not necessarily involve a loss. The owner saves the cost of wages and provisions and other expenses of navigating the ship; so that if he were entitled to recover the whole amount of the freight insured, he would receive a much larger profit than he would have received if the voyage had been performed. If there was a profit in the rate of freight over and above that cost, he loses that; but he might lose it equally by an acci-

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dental prolonging of the voyage. If there was no profit on the freight, he loses nothing.

Where a ship is disabled, and the master procures another to take on the goods and earn the freight, the policy on the freight attaches to the freight of the goods on board the new ship, and covers it, so that if that vessel is lost with the goods on board, the underwriter on it is liable. This well settled rule is entirely inconsistent with the idea that a loss of the ship necessarily involves the loss of freight.

The general principle may be stated thus: Insurance on the freight of a ship with a cargo on board attaches to both subjects, ship and cargo; and the contract of the insurer is that the owner shall not be prevented by the perils of the seas from earning that freight; but it does not attach exclusively to either subject; and if either is lost, and yet the freight is earned, the insurer is not liable. If, for instance, the cargo is lost by seizure, capture or other cause, and the master can nevertheless obtain another cargo, accomplish his voyage and earn his freight, the insurer is not liable. Or, if the ship is disabled, and the master may and does procure another to take on the cargo, and so earn his freight, the insurer is not liable.

4. If the plaintiff is entitled to recover for a total loss of freight, he must account for the freight earned and received by him for carrying on and delivering the cargo, as so much salvage; and the verdict must be reduced in that amount.

5. The validity of an abandonment depends upon the facts existing, and not upon the information received by the assured, at the time of making it. 2 Phil. Ins. § 1657. *Marshall* v. *Delaware Ins. Co.* 4 Cranch, 202. *Church* v. *Bedient*, 1 Caines Cas. 21. *Adams* v. *Delaware Ins. Co.* 3 Binn. 287. The abandonment in this case was made after the cargo had been reshipped and was in course of transportation; so that there was then no loss of freight.

R. H. Dana, Jr. & D. Thaxter, for the plaintiff.

Judgment was entered at March term 1859.

Bigelow, J. 1. Assuming that, on the facts proved at the trial, an abandonment was necessary to enable the plaintiff to

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recover for a constructive total loss, we are of opinion that sufficient facts were shown to establish a valid abandonment.

If the case stood on the letter of December 13th from the plaintiff to the defendants, communicating to them the letter which he had received from the master, there would have been more reason for maintaining that the abandonment was insufficient, because neither his letter nor that of the master contained any distinct or definite statement from which it could with certainty be inferred that the loss was owing to a peril insured against. A condemnation in a foreign port, after a survey occasioned by the necessity of there making extensive and costly repairs on the vessel, without any intimation as to the cause which rendered them necessary, may, under certain circumstances, be deficient in one of the essential requisites of a valid abandonment. As such condemnation and sale might be expedient and necessary from causes other than that arising from the risks covered by the policy, a mere statement of them as the cause of abandonment, and the foundation of a claim for a total loss, may give no information to the insurer, on which he can act with safety, that the loss in fact arose from one of the perils against which he agreed to indemnify the assured. The validity of such an abandonment, however, depends very much on the circumstances under which it was made, and how it must have been understood by the parties. *Heebner* v. *Eagle Ins. Co. ante*, 136.

But the case of the plaintiff does not rest on these letters. It appears that subsequently, and within thirty days after he received the letter of the master communicating to him intelligence of the loss of the vessel, and immediately after the master's return, he went to the defendants in company with the master, exhibited to them the protest and survey, and then claimed of them a total loss. No particular form is necessary to constitute a valid abandonment, nor need it be in writing. It is sufficient if the assured claims a total loss of the insurers, under circumstances from which an intent to abandon may be fairly inferred. Nor is it requisite that the cause of the loss should be distinctly stated, if the assured, in

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making the abandonment, refers to the intelligence in his possession as the ground of his claim, puts it within the reach of the underwriter, and the latter omits to inquire unto the circumstances or to ask for further information. 2 Phil. Ins. § 1682. *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 604. *Macy* v. *Whaling Ins. Co.* 9 Met. 359. *Heebner* v. *Eagle Ins. Co. ante*, 139. The defendants could have had no doubt of the intention of the plaintiff to make an abandonment by his claim for a total loss in company with the master on the 10th, 11th or 12th of January. This verbal claim, in connection with his previous letter of December 13th, in which he made an explicit abandonment of both vessel and freight, left no doubt as to his intention, and it could not have been misunderstood by the defendants. There was a sufficient disclosure of the cause of the loss. By the protest it appears that the vessel, in her passage from the Chincha Islands to Callao, met with strong breezes and a heavy sea, after which she leaked badly; that she was tight and stanch when she set sail; and that the leaks were not occasioned by any insufficiency of the vessel. By the survey made at Callao, it is shown that she was "much strained, and had worked in her whole frame." These papers were exhibited to the defendants; and the master was present, who knew the circumstances and the occasion of the injury to the vessel, from whom the defendants might have obtained further and fuller information, if they had deemed it necessary to ask for it. Nor can it be contended that this abandonment was not seasonable. It was made as soon as the plaintiff had received sufficient intelligence of the cause of the loss to enable him to make it. On the 13th of December he communicated to the defendants all the information he had by the letter from the master of November 10th. As this did not contain any statement of the cause of the loss, the subsequent delay was not only not unreasonable, but was essential to enable the assured to make his abandonment complete and sufficient. The jury having found that the loss was occasioned by perils of the sea, and it being admitted that the plaintiff is entitled to recover for a total loss of the ship if a valid abandonment was made, we

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are of opinion that he has established a right to recover so much of his claim as is equal to the sum at which the ship was valued in the policy.

2. The only other question in the case is, whether the facts proved at the trial show a valid claim for a total loss of freight to the full amount insured by the policy. Two questions arise on this part of the case.

The first is, whether, if the defendants are liable at all, a recovery is to be had for the full sum at which the freight is valued in the policy, or only for the difference between the valuation and the amount earned on the outward voyage; in other words, Is the sum which was received by the plaintiff for the carriage of a cargo from Boston to San Francisco to be deducted from the sum at which the freight is valued, in order to ascertain the sum to which the plaintiff is entitled in case of a loss of freight occurring on the homeward voyage? Upon this point we can entertain no doubt. The voyages contemplated and covered by the terms of the policy were to ports at a long distance from each other, on each of which the amount of freight pending might be very nearly equal to the valuation, and the aggregate of that which would be at risk during all the successive voyages would far exceed it. If the policy is to be construed so that the freight earned on the first voyage is to be deducted from the valuation, the freight which would be at risk during the subsequent stages named in the policy would be nearly, if not entirely uninsured. Such could not have been the intention of the parties in making the contract of insurance. In the absence of any explicit provision to the contrary, the reasonable inference is, that the parties intended to protect by the policy the subject matter which would be at risk during the successive stages of the voyages specified. The insurance is not on th aggregate freight of all the voyages, but on the freight pending during each period. The rule of law applicable to the construction of policies like the one declared on, is well and carefully stated in 2 Phil. Ins. § 1208. It is in substance this: A valuation of freight in a policy for successive voyages is presumed to be of that successively pending: but this presumption is liable

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to be rebutted by circumstances showing that the valuation is applicable to the aggregate amount of the successive freights. No such circumstances exist in the present case. On the contrary, it appears that distinct voyages or adventures, not one round voyage, were contemplated by the parties; that the amount of the outward freight, which must have been ascertained when the policy was issued, nearly exhausted the valuation, so that, on the construction contended for by the defendants, the subsequent voyages would be substantially uninsured; and that the premium seems to have been calculated on the basis of a continuance of the entire risk during the successive voyages, as is shown by the stipulation for additional premiums. Regarding the contract as one of indemnity, it should be construed in such manner as to give protection to the assured for the amount of the subject matter at risk to the extent of the valuation, unless a different intention is unequivocally manifested. For this reason a different rule of interpretation is to be applied to policies from that applicable to charter parties, in determining whether a sum stipulated to be paid for the hire of a vessel is divisible, or due only on the completion of an entire voyage or succession of voyages. *Davy* v. *Hallett*, 3 Caines, 16. *Patapsco Ins. Co.* v. *Biscoe*, 7 Gill & Johns. 293. *Hughes* v. *Union Ins. Co.* 8 Wheat. 294. *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 595. 1 Arnould on Ins. § 128. It follows that as the homeward voyage had commenced, and the entire subject of valuation was at risk, when the injury by a peril of the sea happened, which occasioned a total loss of the ship, the assured, if he can recover at all for a loss of freight, is entitled to the full sum at which it is valued in the policy.

3. This brings us to the consideration of the remaining and more interesting question, whether the facts disclosed are such as to give the plaintiff any claim on the defendants for a loss of freight. The ground on which this claim is resisted is, that although there may have been a constructive total loss of the ship, consequent on a justifiable sale, rendered necessary by perils insured against, there has been no loss of freight whatever, because it appears that the cargo with which the ship was laden

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was taken out uninjured, and transhipped by the master on board of another vessel, by which it was conveyed in safety to the port of destination, where the agreed price for its carriage was paid by the consignees; and that it makes no difference in this respect, that the cost of transhipment and carriage by the substituted vessel is equivalent to the sum agreed to be paid to the plaintiff for the transportation of the cargo by the original ship.

But we cannot think this view of the facts is founded on a just appreciation of the contract of insurance on freight, or of the relation which subsisted between the master and the parties interested in the ship, cargo and freight, at the time when the constructive loss of the vessel took place. By a contract of insurance on freight, the underwriters agree to make good to the owner of the ship the sum which would have been earned as a compensation for the carriage of the cargo, but for the intervention of the perils insured against. In other words, it is an agreement that the perils insured against shall not prevent the owner from earning freight on a particular voyage. If a policy is made on the freight of a cargo laden on board of a vessel destined for a designated voyage, the risk attaches to that particular cargo on board of that vessel. It is, in effect, a stipulation that the insurer will indemnify the owner, if the vessel, owing to one of the perils insured against, is prevented from earning the freight on that cargo. It has therefore been said by this court, that after a policy has so attached to that vessel and cargo, as a general rule, with some exceptions, if the vessel is wholly lost by a peril insured against, the power of earning freight is lost, and the insurer is liable on his contract. *Lord* v. *Neptune Ins. Co. ante*, 113.

In the application of this rule, the effect of a constructive total loss of the vessel is the same as an actual total loss. This is the necessary result of the legal right which the owner has to abandon his vessel and give up the voyage for a sufficient cause. The contract of affreightment and that of insurance on the freight must be presumed to have been made in contemplation of a contingency which might justify such abandonment. As the ship, cargo and freight are each proper subjects of insurance,

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the owner of each may well protect his interest by a policy; and the right of each under his policy cannot be in any way affected or impaired by the existence of insurance on the other subjects at risk. *Lord* v. *Neptune Ins. Co. ante*, 121. Therefore the right of the owner, in case of a constructive total loss, to abandon his vessel and thereby to lose the power of earning freight, cannot be restricted or taken away by the existence of policies on the cargo and freight. Indeed, the insurers on the latter must be presumed to have taken, as one of the risks included in their contract, a constructive total loss of the vessel by one of the perils insured against. Therefore a technical total loss of the vessel may involve a loss of the freight; because, by her lawful abandonment to the underwriters and the consequent vesting in them of the title to the vessel and her capacity to earn freight, (if it cannot be otherwise earned,) he has lost the freight which he would have earned by the completion of her destined voyages. Such, as we have before said, with some exceptions, is the general rule, and by it the plaintiff is entitled to recover his full freight in this action, unless the transhipment of the cargo to another vessel and its carriage to the port of discharge for a sum paid to the owners of the substituted vessel, equal to that which would have been paid to the plaintiff, if his vessel had completed the voyage and delivered the cargo, takes the case out of the rule and brings it within a recognized exception to it. No authority in support of such an exception has been cited, nor are we able to find any foundation for it in the principles of law applicable to freight as a subject matter of insurance. On the contrary, it seems to us to be inconsistent with them. The elementary definition of the term "freight," as used in policies, is the earnings derived by a shipowner from the use of his vessel for the carriage of goods. 1 Phil. Ins. § 327. 1 Arnould on Ins. § 89. If a vessel is lost by perils of the sea, and the cargo is sent forward by the master by another ship, at a rate of freight equal to that which the original vessel would have earned if she had successfully prosecuted her voyage, the owner receives nothing as the earnings of his vessel. The compensation paid for the transportation of the cargo by the con-

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signees of the shipper passes into the hands of the owner of the substituted vessel. The insured in fact loses not only the profits which would have accrued to him from the contract of affreightment, if he had fulfilled it by delivering the cargo in his own vessel, but also the expense incurred by him in preparing his vessel for the cargo, taking it on board and carrying it to the place of transhipment. It cannot be said that under such circumstances freight, in the sense in which it was understood by the parties to the contract of insurance, has been earned by the assured. The guaranty of the insurer amounts to something more than an agreement that the cargo shall be delivered at the port of destination, so that the amount stipulated to be paid for freight shall be due from the shippers. Such an interpretation of the contract would dissociate freight, as a subject of insurance, from the vessel by which it is to be earned, and attach it wholly to the cargo; and the policy would cease to be a contract of indemnity, by which the owner of a vessel would be protected against loss by reason of the failure of his vessel to earn freight in consequence of a peril insured against.

But it is urged on the part of the defendants, that the loss of a ship at an intermediate port does not necessarily draw after it the loss of the freight; because, if the cargo remains, as in the present case, uninjured, so that it can be transhipped and forwarded, it is the duty of the master to send it on. Both branches of this proposition, taken separately, are true. No doubt there are cases where a vessel is disabled by perils of the sea, and is thus lost or abandoned, in which no claim for a total loss of freight, either actual or constructive, can be maintained. If, for example, a part of the prescribed voyage has been accomplished before the happening of the peril which has disabled the ship, and the cargo remains *in specie*, so that it can be sent forward to the port of discharge at a cost less than a moiety of the stipulated freight, no total loss of freight is thereby occasioned In such case, it is in the power of the owner of the ship, through his agent the master, by a proper exertion of due diligence, to receive a large part of the freight which his vessel had earned prior to her loss. This opportunity he cannot disregard or throw

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away. The perils insured against have not deprived him of his freight, or of the capacity of earning it. It is the neglect and omission of his agent, the master, which prevents him from receiving from the shippers the larger part of the stipulated freight as the earnings of his vessel. But it does not follow that, in all cases where the cargo remains in a condition to be reshipped and carried to the end of the voyage, it is the duty of the master, as agent for the owner of the ship, to reship and forward it, or that, if such reshipment is made and the cargo is forwarded and delivered to the consignees, the stipulated freight is thereby earned, so that no claim for a total loss of freight can in such case be sustained. If at the intermediate port the cost of forwarding the cargo in a substituted vessel is as great as or larger than the freight stipulated to be paid by the shipper, the owner of the original vessel can earn no freight, in the sense in which this term is used in a policy on the freight of his vessel, by forwarding the cargo. Nothing can accrue to him, or to the underwriters on freight, by the transhipment and carriage of the cargo. The expense of forwarding the cargo, which is a consequence of a peril insured against, absorbs all that is received for its transportation, and there is no excess of the freight stipulated to be paid for the hire of the original vessel, over the cost of sending forward the cargo, which can come either to the owner of the vessel or the underwriter on freight.

The mistake occurs in supposing that the master is obliged, in his capacity as agent for the owner of the vessel, in all cases of disaster to the vessel, to send forward the cargo, if it remains in a condition to render its transhipment judicious and expedient. But how is any such duty or burden imposed on the owner of the vessel? Certainly not by virtue of the contract of affreightment. That involves no undertaking that the cargo shall be forwarded to its place of destination at all events and under all circumstances. On the contrary, it is always subject to the proviso that its performance may be defeated and excused by perils of the sea. Nor can it be said that the contract of insurance on freight imposes on the assured any obligation to forward the cargo after the loss of the ship, when no part of the

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stipulated freight, which was the subject of insurance, can be thereby saved, but the expense of forwarding will equal or exceed the sum to be paid by the shippers. In such case the goods or the cargo by being sent forward can indeed earn freight, but not the freight covered by the policy. The lost vessel can earn no freight, nor by sending forward the cargo can anything be saved as her earnings of that part of the voyage which she has performed. There can be, in such a case, no salvage of freight. We by no means intend to say that it may not be the duty of the master to forward the cargo, after the loss of the vessel, when it can be done for the same or even a greater freight than was to be paid, under the charter party or bill of lading, for carriage by the original vessel. But such an act by the master, although judicious and expedient, would not deprive the owner of his claim for a total loss of freight. If it did, the law would operate with great inequality and injustice. An owner, in case of the loss of his vessel at an intermediate port, where the master was unable to find another vessel to carry on the cargo, would recover the whole sum insured on his freight. What good reason can be given for depriving an owner of his indemnity under his policy for loss of freight, merely because the master preserves the goods, and causes them to be sent forward to the port of destination, at a cost which absorbs the whole sum which was to be paid for the freight of the original ship, leaving nothing to be received under the original contract of affreightment? The actual loss to the owner of the ship is the same in both cases. He receives no benefit by the transhipment of the cargo. The only difference is, that the master in the latter case is enabled to do an act which may enure to the benefit of the owner of the cargo. But certainly this is no reason for taking away the owner's right to an indemnity under his policy on the freight of his vessel.

The cases cited by the learned counsel for the defendants do not go to the extent of maintaining the position on which they rely. Some of the decisions of the courts in this country contain *dicta* in which the duty of the master to tranship is stated without any qualification whatever; but it is in none of them

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determined that this is a duty which in every case devolves on him as the agent of the master or of the insurer on freight. It may be difficult to define with accuracy the extent of the master's authority to act for the various parties interested in a voyage, or to fix, definitely, the point at which his agency for one party ceases and for another begins. But we think it may be safely said that whenever and as soon as the owner of a vessel, by reason of the perils of the sea, ceases to have any interest either in the ship or freight, so that nothing of either can be saved or protected by any act of the master, his authority to bind the owner is at an end. The subject matter of the master's agency for the owner of the ship has in such case ceased to exist, and his power to bind his principal ceases with it. The owner himself, if present at an intermediate port under such circumstances, would have no motive or interest in the further prosecution of the voyage. Hence it is that although, in the ordinary state of things, the master is a stranger to the cargo beyond the purposes of safe custody and carriage, yet in cases of necessity, unforeseen and unprovided for, the character of agent for the owner of the cargo may be forced upon him, not by the immediate act of the owner, but by the policy of the law; otherwise valuable property in his possession and control might be left without any means of care or protection. It may be that the owner of the vessel may adopt and ratify a transhipment made by the master, where the voyage is completed and the cargo carried in a substituted vessel for the original freight, leaving nothing as earnings of the lost vessel. The owner of the cargo could in such case make no complaint or objection, because the contract of affreightment would be fully complied with. But such an act of the master, as binding the owner of the ship, would derive its efficacy, not from his original authority, but from the subsequent ratification. In the absence of any adoption or recognition by the owner of such transhipment, we know of no principle or authority on which it can be held absolutely binding on him. On the contrary, the more reasonable doctrine is that stated in 2 Phil. Ins. § 1634: "If the motives of the master's course are wholly on the side of one party, then he

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must be presumed to have acted on behalf of such party." See *The Gratitudine*, 3 Rob. Adm. 240; *Shipton* v. *Thornton*, 9 Ad. & El. 333; *Gibbs* v. *Grey*, 2 H. & N. 22; Emerigon on Insurance, c. 12, sect. 16, § 6, (Meredith's ed) 343.

Upon the direct question whether, on the facts proved at the trial, the defendants are liable for a total loss of freight, the authorities are quite decisive. In *Whitney* v. *New York Firemen Ins. Co.* 18 Johns. 210, the court say, "To sustain such an action on a policy for freight, the plaintiff must prove that the ship was disabled by the perils insured against, and that the cargo could not have been carried forward from the port of necessity to the port of destination for one half the freight valued in the policy." The same doctrine is fully recognized in *American Ins. Co.* v. *Curtis*, 4 Wend. 53, in which the chancellor states the rule thus: "If no freight *pro rata itineris* has been earned, or the expense of sending on the cargo by another vessel is equal to or exceeds the whole amount of freight agreed upon by the charter party, there is an absolute total loss of freight. If the expense of sending on the cargo by another vessel will exceed a moiety of the freight, it is a technical total loss of the freight, which will authorize the assured to abandon." These decisions, it is to be observed, were made subsequently to the decisions of the cases in the courts of the same state, cited by the counsel for the defendants, in which the duty of the master to tranship and forward the cargo had been stated in the broadest and most comprehensive terms.

In our own court the decision in *Coolidge* v. *Gloucester Marine Ins. Co.* 15 Mass. 341, seems directly in point. That was a case of a constructive total loss of the vessel, which was abandoned to the insurers. She was afterwards repaired, and took on board the same cargo with which she had been laden at the time of the loss, and carried it to the port of destination for "the same amount which would have been earned, if the ship had not met with any disaster." The court say that the vessel, when repaired, must be regarded as a new vessel, and if the master could have procured a new vessel to carry the goods to the port of delivery, "no one would have doubted but that the owners

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of the new vessel would have been entitled to the earnings;" and it was held that there was a total loss of freight. See also 2 Phil. on Ins. §§ 1444, 1632.

It was suggested by the learned counsel for the defendants, that the expense of forwarding the cargo by the substituted vessel was only an additional cost or charge which would destroy or take away the profits which otherwise might have been earned under the charter party, and that as the policy did not cover a loss of profits or include a guaranty that the cost of transporting the cargo to the port of destination should not exceed or equal the stipulated freight, there could be no claim for a total loss of freight in this case, inasmuch as the agreed price was paid by the consignees of the cargo. The fallacy of this argument has been already adverted to. It proceeds on the ground that the guaranty of the insured is, that the goods shall earn freight; whereas the real contract is, that the vessel shall earn freight by carrying the goods notwithstanding the perils of the sea. The interest in the freight is connected with the ownership of the vessel, and the insurance upon it is on an accessory to such ownership. It is not an insurance that the cargo will earn freight, as disconnected from the vessel. Besides, we do not see why this argument of the counsel against the right to recover in this case for a total loss would not be equally strong against the right to claim a partial loss, when a large part of the freight had been earned by the original vessel, and the expense of forwarding the cargo had been paid by the owner of the ship. It might be said in such case that the whole freight had been earned and received by the owner of the ship, and that the additional cost of transhipment was only an expense which diminished the profits that might have otherwise accrued, and was not a proper subject for a claim of loss under the policy. But it cannot be doubted that the additional freight paid for the carriage of the goods by the substituted ship would be a partial loss for which the insurer on freight would be liable.

Without going more at large into arguments and illustrations bearing on the question, we are of opinion, on the authorities

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and principles above set forth, that the plaintiff has established a claim for a total loss of freight, and that judgment must be entered accordingly.

Judgment on the verdict for the plaintiff.

COMMONWEALTH *vs.* WILLIAM EVANS.

Upon the sustaining by this court of exceptions in a criminal case, the costs of papers for the court are to be paid by the Commonwealth.

THE defendant was convicted in the municipal court of Boston at June term 1857, upon the *St.* of 1855, *c.* 405, and alleged exceptions to the rulings of the presiding judge, which were sustained by this court, with the consent of the attorney general, upon the authority of *Commonwealth* v. *McCaughey*, 9 Gray, 296.

The defendant now contended that in any criminal case brought up to this court by exceptions or report, under the Rev. Sts. *c.* 138, § 13 — as expressly provided upon appeals in criminal cases from a justice of the peace, or from the court of common pleas or municipal court, by §§ 2, 3, 5, 6, *in pari materia* — the costs of copies of papers for this court must be paid by the Commonwealth, unless the defendant was convicted; the intention of the statute being to give the accused in all cases the unrestricted right of obtaining the opinion of this court upon any question of law. And THE COURT were of this opinion, and so ordered.

B. F. Butler, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

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COMMONWEALTH *vs.* THOMAS SKELLEY.

An indictment for a nuisance by keeping and maintaining "a tenement" in a certain street and city, used in a manner prohibited by *St.* 1855, *c.* 405, need not more particularly describe the place so used.

INDICTMENT on *St.* 1855, *c.* 405, averring that the defendant, during a certain time, at Boston, "did keep and maintain a certain common nuisance, to wit, a tenement in Portland Street in said city of Boston," then and there "used for the illegal sale and illegal keeping of intoxicating liquors."

At the trial in the municipal court of Boston at November term 1857, it appeared, on cross-examination of some of the witnesses for the Commonwealth, that the defendant with his family occupied a part of a building elsewhere as a dwelling. The defendant, at the close of the evidence, moved that the case should be taken from the jury, because the word "tenement" was too general; and this motion being overruled and a verdict of guilty returned, made a similar motion in arrest of judgment, which was also overruled; and he alleged exceptions.

G. Sennott, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J.* By *St.* 1855, *c.* 405, § 1, on which this indictment is founded, "all buildings or tenements, used for the illegal sale or keeping of intoxicating liquors, are declared to be common nuisances, and are to be regarded and treated as such." And we are of opinion that the words "a certain tenement in Portland Street in the city of Boston" sufficiently describe the nuisance which the indictment charges the defendant with keeping and maintaining. The approved forms of indictments for other common nuisances describe the place thereof as a certain building, a certain disorderly house, a certain shop, a certain common gaming house, &c., without further description. 2 Stark. Crim. Pl. (2d ed.) 687. 2 Chit. Crim. Law, 39–41. Crown

* In the cases following, MERRICK, J. took the place of THOMAS, J.

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Circ. Comp. (7th ed.) 519. Archb. Crim. Pl. (13th ed.) 748, 749 *State* v. *Nixon*, 18 Verm. 70. We see no more reason for a particular description of a tenement, in an indictment, than of a building, house or shop. *Exceptions overruled.*

COMMONWEALTH *vs.* ELLEN HART & another.

An indictment, which avers that the defendants, on a day named and on divers other days and times between that and another day, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, by them used and kept as a house of ill fame, and resorted to for the purpose of prostitution and lewdness; and for their own lucre and gain, certain persons, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together did unlawfully and wilfully cause, permit and procure, and, as well in the night as in the day, did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens; sufficiently states a nuisance under *St.* 1855, *c.* 405; and is not bad for duplicity as stating also the common law offence of keeping a disorderly house.

INDICTMENT, alleging that the defendants at Boston on the 1st of June 1857, "and on divers other days and times between said first day of June and the first day of October eighteen hundred and fifty seven, at said Boston, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, then and on said other days and times, there situated on North Street, in said Boston, numbered one hundred and fifty eight, and then and on said other days and times there by them kept and used as a house of ill fame, and then and on said other days and times there resorted to for the purpose of prostitution and lewdness; and that the said defendants in said house, for their own lucre and gain, certain persons, whose persons and names to said jurors as yet are not known, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together did then and on said other days and times there unlawfully and wilfully cause, permit, and procure, and said men and women in said house, as well in the night as in the day, then and on said other

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days and times, there did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens then and on said other days and times there residing, passing and being; and in evil example to all others in like case offending; against the law, peace and dignity of said commonwealth, and contrary to the form of the statute in such case made and provided."

In the municipal court of Boston, the defendants pleaded *nolo contendere;* and moved in arrest of judgment, because the offences charged in the indictment were inconsistently, vaguely and too indefinitely set forth, and because more than one offence was set forth therein. *Huntington*, J. overruled the motion, and reported the case to this court.

B. F. Butler & N. St. J. Green, for the defendants. 1. If this indictment alleges but one offence, the allegation is too vague and uncertain. "Did keep and maintain a certain common nuisance" is clearly insufficient. Every other allegation is made under a "to wit," which cannot be used where certainty of allegation is required, but whose proper office is to avoid certainty of statement, so that strict proof shall not be required *Durston* v. *Tuthan*, cited 3 T. R. 67. *Arnfield* v. *Bate*, 3 M. & S. 173. The allegation, being descriptive of the offence, cannot be rejected as surplusage, although laid under a "to wit." *The King* v. *Stevens*, 5 East, 244. But here is a twice repeated "to wit:" "to wit, a building," "to wit, a house," for which no precedent can be found. It is a slovenly mode of pleading, and not to be encouraged.

2. The indictment is bad for duplicity. It sets forth with apt words that the defendants on a day certain were guilty of the statute offence provided against in *St.* 1855, *c.* 405, §§ 1, 2, and to which a statute penalty is affixed. It then avers in the same count that the defendants were guilty of the common law offence of maintaining a disorderly house, the punishment of which is discretionary.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Merrick, J. It is contended on the part of the government that the defendants are charged in the indictment with the com-

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mission of one of the offences enumerated in the *St.* of 1855, *c.* 405, by which all buildings, places and tenements, used as houses of ill fame, and resorted to as such, are declared to be common nuisances; and persons keeping the same are made subject, upon conviction, to punishment by fine or imprisonment, at the discretion of the court wherein they are convicted.

A verdict having been returned against the defendants, they filed a motion in arrest of judgment, upon the ground that the indictment was vague, uncertain and insufficient in its averments; and in support of this motion they insist that the indictment does not truly, nor in apt and appropriate legal terms, describe any one of the offences mentioned in the statute; or, if the contrary might, upon any just and proper principles of construction, be assumed, that it describes also the common law offence of keeping a disorderly house, and is thus bad for duplicity in alleging in a single count the commission of two several and distinct offences.

But upon a careful scrutiny of its allegations, the indictment does not appear to be so obnoxious to objection, either upon the ground of the imperfection or the redundancy of its averments, as to afford a sufficient reason for refusing to enter judgment upon the verdict. It certainly has the appearance of having been prepared with but little deliberate care, and with less attention to precision of expression in the description of the particular offence intended to be proceeded against under the provisions of the statute, than it is desirable to see in all legal, and especially in all criminal, proceedings. It contains undoubtedly several phrases which are partially descriptive of another offence, as well as of that which, we think, it is quite apparent it was the obvious purpose of the grand inquest to charge against the defendants. These phrases and forms of speech are however pertinent, and may therefore well be used in the description of different offences; but their force and significance will, in each particular instance in which they are used, depend altogether upon the manner in which they are introduced into the pleadings, and upon their connection with other allegations.

In this case the indictment sets forth that on the first day of

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June, and on divers other days and times between that day and the first day of October then next ensuing, the defendants knowingly did keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, situate on North Street in the city of Boston, numbered one hundred and fifty eight, resorted to for the purpose of prostitution and lewdness. All the other allegations and parts of the indictment have immediate and direct reference to this averment of the maintenance of a common nuisance, as it is identified and particularized in the statements under the *videlicet*. The precise and legal use of a *videlicet* in every species of pleading is to enable the pleader to isolate, to distinguish, and to fix with certainty, that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects. 1 Chit. Crim. Law, 226. That is the use which was made of it in this indictment. The common nuisance complained of is thus shown to be the keeping of a house of ill fame, contrary to the provisions of the statute; and by this explanation the general expression first used, though susceptible of a different meaning in itself, is restricted and confined to a precise and definite fact, and the accused are thereby secured against all danger of misapprehending the exact offence for which they are called upon to answer.

If there are other expressions in the indictment which are not essential to a distinct statement of the offence intended to be charged against the defendant, they may be regarded as useless and rejected as surplusage; for none of them are in conflict with the general purpose of the prosecution or inconsistent with an accurate description of the particular offence which is complained of. *Motion overruled.*

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COMMONWEALTH *vs.* JAMES O'HARA.

An indictment for larceny of property pledged and in the possession of the pledgee may describe it as the property and in the possession of the pledgor.

INDICTMENT for larceny of "the property, goods and chattels of Samuel Adams, in his possession then and there being."

At the trial in the municipal court of Boston at July term 1857, the evidence tended to show that the property alleged to have been stolen was deposited with George Bond and others, as security for a loan of money from them, which was to be repaid at the pleasure of the pledgor. The defendant asked the court to rule that this evidence did not support the allegation in the indictment. But *Abbott*, J. ruled that "if the property so alleged to be stolen belonged to Samuel Adams, and was pledged to Bond as security for a loan of money, with the right to resume possession by Adams, on paying the loan at his will, it was sufficient to meet the allegation in the indictment." To this ruling the defendant, being found guilty, alleged exceptions.

B. F. Butler & N. St. J. Green, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. This case falls directly within the principle of the Rev. Sts. *c.* 133, § 11, declaring it to be sufficient if either the general or special property in the goods stolen be in the person alleged in the indictment. Such was also the rule at common law, independently of the statute. *Commonwealth* v. *Morse*, 14 Mass. 217. Archb. Crim. Pl. (13th ed.) 34, 271.

Exceptions overruled.

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COMMONWEALTH *vs.* MARTIN GRIMES.

An indictment for stealing bank bills sufficiently describes them as "sundry bank bills, of some banks respectively to the said jurors unknown, of the amount and value in all of thirty eight dollars, of the property, goods and chattels" of a person named.

INDICTMENT for stealing "sundry bank bills, of some banks respectively to the said jurors unknown, of the amount and value in all of thirty eight dollars, of the property, goods and chattels of one James Gallagher, in his possession then and there being."

After trial and conviction in the municipal court of Boston at January term 1858, the defendant moved in arrest of judgment, "because there was no sufficient allegation in the indictment as to the denomination and number of the bank bills, and no sufficient description of the offence." *Huntington*, J. overruled the motion, and reported the case to this court.

J. H. Bradley, for the defendant, cited Declaration of Rights, art. 12; *Commonwealth* v. *Sawtell*, 11 Cush. 142; *Commonwealth* v. *Maxwell*, 2 Pick. 139; *Stewart* v. *Commonwealth*, 4 S. & R. 194; *Low* v. *People*, 2 Parker C. C. 39; Archb. Crim. Pl. (10th ed.) 45–48; 2 Russell on Crimes (7th Amer. ed.) 107, 111.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. This indictment, it is contended on the part of the defendant, is defective in not setting forth the number of bank bills stolen, nor the value or denomination of each particular bill.

In larceny of silver coins, the general form of charging the offence as a larceny of "sundry pieces of silver coin, amounting together to the sum of twenty dollars," without describing each piece of coin, has been long practised, and sanctioned by this court. In the case of bank bills, it has been considered more questionable, and they have been usually described more particularly as to the number and denomination of the bills. Whether the general form of description adopted in the present case would be held bad on a motion in arrest of judgment, was

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somewhat considered in the case of *Larned* v. *Commonwealth*, 12 Met. 240, but was not decided, the case not requiring it.

The same reasons exist for such general description of bank bills, as of coin. When taken from one holding them as currency for daily use, and when composed, as they may be, of all the smaller denominations of bills, it would be as difficult to describe the number of bills taken, or their denominational value, as it would be in a case for larceny of silver coin. To meet such necessity great latitude has been allowed in describing the particular coin, and we think a similar rule may be applied to an indictment for larceny of bank bills.

The amount of the bills is here alleged, as is also the value, thus showing the amount of property alleged to have been stolen.

The grounds of objection to this form of indictment are, that it does not sufficiently apprise the party of the precise offence with which he is charged, and also that it is not sufficiently particular to enable him to plead the judgment in this case in bar of a subsequent indictment for the same offence. But these might equally exist under an indictment alleging the number of bank bills stolen, as the indictment might well be sustained, though the proof showed a less amount to have been stolen. In many cases, to identify the larceny charged in a former indictment, you must resort to oral evidence. To give effect to this mode of charging the offence would leave the defendant under no greater embarrassment as to the precise offence charged, or less opportunity to plead a former conviction or acquittal in bar, than arises in many other cases where offences are held to be legally charged, although in general terms, or where the precise allegations need not be proved.

In the opinion of the court the offence is here sufficiently charged, and the motion in arrest of judgment must be overruled. See *Commonwealth* v. *Stebbins*, 8 Gray, 492.

Motion overruled.

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Commonwealth *vs.* Edmund E. Price.

In a criminal case, in which the only evidence for the prosecution was the testimony of accomplices, the judge advised the jury to acquit, but instructed them that if upon the whole evidence they were convinced beyond a reasonable doubt of the guilt of the defendant, they should find a verdict of guilty. *Held*, that the defendant had no ground of exception.

An indictment for having a counterfeit bank bill at Boston "with intent then and there to utter and pass the same" is supported by evidence of possession with intent to utter and pass it at a place out of the state.

Possession of a counterfeit bill of a bank in this state, with intent to pass it in another state, is within the Rev. Sts. c. 127, § 8.

Under an indictment for having a counterfeit bank bill with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank bills is admissible to show guilty knowledge and intent.

An accomplice, who has testified to facts criminating the prisoner and himself, cannot afterwards decline to answer a question upon the ground that it will criminate himself. But if, after so declining, he offers to submit himself to the examination, a party who refuses the offer has no ground of exception.

Indictment averring that the defendant on the 18th of September 1857 at Boston had in his possession a counterfeit bill for $500 of the Blackstone Bank, established at Boston, "with intent then and there to utter and pass the same," knowing it to be counterfeit.

At the trial in the municipal court of Boston at November term 1857, before *Nash*, J., George R. Cowee testified that the defendant brought this bank bill and others to him, unsigned, and at the defendant's request he filled up the signatures and handed the bills back to the defendant at Boston; that the defendant asked his advice as to the best place to pass the bills, New York or Portland, and he recommended Boston, but the defendant refused to have anything to do with passing them here; that finally they and Jacob S. Stanton went to Portland, and there divided the bills among them, the defendant handing this bill to the witness; that on their return to Boston they divided their profits; and that eight days afterwards, in New York, he saw in the defendant's possession counterfeit bank bills on banks in Rhode Island and New Hampshire.

The defendant objected to the evidence of the possession of

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those bills; but the court admitted it, as bearing on the question of guilty knowledge or intent.

On cross-examination Cowee testified that he had been convicted of forgery and was now awaiting sentence, and that he testified in this case in the hope that it would make some difference in his sentence. He was then asked, "Who passed the $500 bill in Portland?" and declined to answer, upon the ground that it might criminate himself; and the court ruled that he need not answer, because he had not been cautioned as to his rights, and had not gone so far in telling a part of the transaction, after having information of his rights, as to put himself beyond the protection of the rule. Other questions were put to this witness on cross-examination, which he at first in like manner declined answering, but, after partly answering them, finally withdrew his claim of privilege, and offered to answer all the questions to which he had interposed his privilege; and the court so stated to the defendant's counsel; but he declined to renew the questions.

Stanton testified that he saw Cowee give the defendant in Boston a bill for $500 on the Blackstone Bank, and the defendant took out a genuine bill for $5 and remarked that the signatures were very good; that they then went to Portland together, and upon their return divided the money between them; but did not state what money this was, or how it was obtained, or whether any counterfeit bills were passed; and on cross-examination declined upon the same ground as the other witness to answer the questions, "What portion of the money which was divided did you have?" "Did you pass any bills in Portland?" The court excused him for the same reason as Cowee.

The attorney for the Commonwealth admitted in argument that both Cowee and Stanton were accomplices of the defendant; and the court so instructed the jury, and further, at the defendant's request, instructed them that there was no corroboration of any material point, and that the testimony of Stanton was not to be treated as a corroboration of Cowee's, nor Cowee's of Stanton's. The defendant contended "that on the testimony of Cowee and Stanton it was not competent for the jury

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to convict under this indictment." But the court "instructed the jury, that the evidence of the accomplices being unsupported by any corroboratory evidence, it was unsafe, on account of its corrupt and suspicious source, to convict upon it, without confirmation; and advised the jury to acquit; but that nevertheless it was competent for the jury to convict on the uncorroborated testimony of the accomplices alone; and if, upon the whole evidence, they were convinced beyond a reasonable doubt of the guilt of the defendant, their verdict should be guilty; otherwise, not guilty."

The defendant requested the court to instruct the jury "that under this indictment the defendant could not be convicted, unless it was proved that he had in Suffolk county in his possession the bill set forth in the indictment, and at that time intended to pass that identical bill in Suffolk county; and if the jury believed that the defendant did not intend to pass the bill in Suffolk county, but in Portland, the indictment was not sustained, and the defendant must be acquitted." But the court declined so to instruct the jury, and instructed them "that it was immaterial where the defendant intended to pass the bill; that the statute offence was complete, if the defendant had in his possession in Suffolk county said counterfeit bill, at the same time and place knowing the same to be counterfeit, and at the same time and place intending to pass the same as true elsewhere; and if said possession, said knowledge and said intent coexisted in Suffolk county at the same time, the fact that the place of actual uttering or passing contemplated was Portland, would not entitle the defendant to an acquittal." The jury returned a verdict of guilty, and the defendant alleged exceptions.

B. F. Butler & N. St. J. Green, for the defendant. 1. The jury should have been instructed, as requested by the defendant, that it was not competent for them to convict upon the uncorroborated testimony of accomplices. *Rex* v. *Noakes*, 5 Car. & P. 326. They may have the power, but not the right, to convict upon such evidence. See *Commonwealth* v. *Porter*, 10 Met. 263.

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2. The indictment charges that the defendant had a certain bill in Boston on a certain day, "with intent then and there to pass the same." This "then and there" refer to the place at which the defendant intended to pass the bill; (for the time and place of his having the possession with intent had already been stated;) and cannot grammatically be referred to the intent; and are not supported by evidence of an intent to pass without the Commonwealth.

3. The intent to pass elsewhere, without an intent to defraud, would not be indictable.

4. The evidence that the defendant eight days afterwards had in his possession in another state bills in no respect similar to that set out in the indictment should have been rejected. *Rex* v. *Smith*, 2 Car. & P. 633. *Rex* v. *Smith*, 4 Car. & P. 411. *The King* v. *Whiley*, 1 Lead. Crim. Cas. 185 & note.

5. Cowee and Stanton, having testified fully for the government without objection, were bound to answer fully as to facts making in favor of the defendant. 1 Greenl. Ev. § 451. *Foster* v. *Peirce*, 11 Cush. 437. *Chamberlain* v. *Willson*, 12 Verm. 491.

The defendant's right of exception is not taken away by Cowee's subsequent offer to testify. The defendant's counsel, not the witness, had the right to determine how the examination should be conducted.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J. 1. The court are of opinion that the defendant has no legal ground of exception to the instructions which were given to the jury concerning the testimony of his accomplices. *Commonwealth* v. *Brooks*, 9 Gray, 299. *United States* v. *Kessler*, Bald. 22. *Regina* v. *Stubbs*, Dearsley, 555, and 7 Cox C. C. 43. 1 Greenl. Ev. § 380.

2. Nor can we sustain the exception taken to the instruction "that it was immaterial where the defendant intended to pass the bill." The only plausible reason for this exception is found in the form of the indictment, which alleges that the defendant had the counterfeit bill at Boston, "with intent then and there to utter and pass the same." In the first place, the words "then and there," in that part of the indictment, were needless. But,

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without deciding that they may therefore be rejected as surplusage, we construe them as if they had been inserted before the words "with intent," so that they refer to the intent to pass, and not to the time and place of the intended passing. If a comma had preceded and followed the words "then and there," —"with intent, then and there, to utter and pass the same"— the suggested interpretation of the indictment would have been manifest. And the court will not arrest the course of justice, merely because pleaders are careless or unskilful in punctuation, or do not make such a collocation of words as renders their meaning perfectly perspicuous on the first reading.

3. The court have no doubt that the possession of counterfeit bank bills, in the similitude of the bills issued by or for any bank established in this state, knowing them to be counterfeit, and with intent to pass them in another state, is a punishable offence under the Rev. Sts. *c.* 127, § 8. See *Commonwealth* v. *Cone*, 2 Mass. 132.

4. The authorities warrant the admission, in this case, of the testimony that the defendant, several days after the passing of the bill mentioned in the indictment, had in his possession other counterfeit bills. Archb. Crim. Pl. (13th ed.) 475, 619. 1 Greenl. Ev. § 53. *Bottomley* v. *United States*, 1 Story R. 143.

5. The exception to the ruling, that Stanton, the accomplice, was not bound to answer the question put to him, on cross-examination, must be sustained. He must have been fully aware of his privilege, from the beginning, and should have claimed it earlier, in order to have secured it. If a witness consents to testify at all, so as to criminate himself as well as the defendant, in the matter on trial, he must answer all questions legally put to him concerning that matter. He cannot be allowed to state such facts only as he pleases to state, and to withhold other facts. *Foster* v. *Pierce*, 11 Cush. 437, & cases there cited. *Low* v. *Mitchell*, 18 Maine, 374. If he could be allowed so to do, injustice might be done to the defendant, either by the keeping back of testimony which would tend directly to his acquittal, or which would so discredit the witness as to induce the jury wholly to disregard his previous testimony.

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The like exception to the ruling, that Cowee was not bound to answer certain questions, must have been sustained, if he had not subsequently offered to answer them. But, as he made such offer, and the defendant's counsel declined to renew the questions, that exception is overruled. *Exceptions sustained.*

COMMONWEALTH *vs.* JAMES WOODS.

An indictment for knowingly having in one's possession a false, forged and counterfeit promissory note is supported by evidence of the possession of a genuine note which has been altered.

A bill of a bank in another state is a promissory note, within the meaning of the Rev. Sts. c. 127, § 2.

Whether it is a fatal variance, in setting out a bank bill according to its tenor, to substitute "Cashier" for "Cash^{r}" — *quære.*

It is no variance in an indictment to set forth a name as "Droun," which is actually "Drown."

A grand jury, without examining witnesses anew, may find an indictment as a substitute for another indictment found by them upon an investigation of the facts at a previous term.

INDICTMENT on the Rev. Sts. c. 127, § 2, found at June term 1857 of the municipal court of Boston, and alleging that the defendant, on the 5th of April 1857, at Boston, "had in his custody and possession a certain false, forged and counterfeit promissory note for the payment of money, of the tenor following, that is to say:

"State of Rhode Island. The Liberty Bank will pay, Providence, Aug. — 1854, to bearer ten dollars on demand.

C. R. Droun, Cashier. D. Evans, Pres^{t}.

unless upon said promissory note there is a date of the day in the month of August eighteen hundred and fifty four, which is to said jurors unknown; the said James then and there knowing the same to be false, forged and counterfeit, with intent thereby then and there to injure and defraud."

A second count, after the name of Droun, had the abbreviation "Cash^{r}" instead of the word "Cashier."

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Trial before *Nash*, J., who signed a bill of exceptions, the material parts of which were as follows:

"The government offered in evidence, to sustain said indictment, a bank note as the promissory note therein set forth. The defendant objected to its admission. But the court admitted the same, and ruled that, under the allegation of a promissory note, it was not a variance to prove a bank note or bank bill.

"The cashier testified that the bank bill produced was originally a genuine one dollar bill; that the figure I had been taken out and X put in, and 'one dollar' taken out and 'ten dollars' put in; and that the day of the month between August and 1854 had been obliterated in removing the figure 'one.' The defendant objected that such proof of an altered bill did not support the allegation of the indictment. But the court admitted the testimony.

"In setting forth the tenor of the bill in the indictment, after the name 'C. R. Droun' was written the word 'Cashier.' On the bank note put in evidence it was 'Cash'r.' The defendant objected that this was a variance. The court ruled that this was no variance, if both words or combination of letters sounded substantially the same. And both sides treating the question as one for the court, the court decided that they did, and that there was no variance.

"The defendant contended that in the indictment the name of the cashier was spelt with the letter 'u,' viz: 'Droun;' whereas upon the bill the name was spelt with a 'w,' viz: 'Drown,' and that this constituted a variance. The court ruled as upon the preceding objection.

"During the trial before the jury it appeared that some of the government witnesses were not before the grand jury at the term at which this indictment was found. Certain inquiries thereon following, it appeared, from the statement of the Commonwealth's attorney, (which it was agreed should be received as sworn testimony, if the facts stated therein were at said stage competent, which the government denied, and subject to all objections on either side as to its competency,) that at May term

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1857 three false, forged and counterfeit bank notes were before the grand jury; that, on due evidence, said grand jury duly found and returned into court three indictments against the defendant for uttering said notes, each on distinct occasions; that all of said indictments were alike in their allegations, except that, in setting out the tenor, one read 'Aug. 8, 1854,' another 'Aug. — 1854,' and the third 'Aug. 7, 1854'; that in the mean time, the Commonwealth's attorney having become convinced that the date of the day of the month had by the process of the alteration or forgery been substantially obliterated, and, on inspection, was practically a blank, brought the matter before the same grand jury at the succeeding June term; and thereupon the grand jury, without the examination of any witnesses at said June term, and at the suggestion and request of the Commonwealth's attorney, returned three new indictments against the defendant for the same three distinct utterings, and on the same three bank notes, as the first three indictments, and as substitutes for the original indictments, one of which is the present, and in all of which the date of the bill was set forth as in this one.

"Thereupon the defendant moved that, for the above reasons, and on the ground that it did not appear that he was upon trial for the same offence for which he stood indicted, the indictment be quashed. The judge overruled the motion."

The jury returned a verdict of guilty, and the defendant alleged exceptions to the rulings above stated, and also to the overruling of a motion in arrest of judgment, founded upon the manner of the finding of the indictment.

N. St. J. Green, for the defendant. 1. The allegation of a false, forged and counterfeit note is not supported by evidence of an altered note. At common law an altered note is a forged note; but in the statutes of Massachusetts the word "forged" is used in a restricted sense, and alteration is not forgery. Rev. Sts. *c.* 127. *Kirby* v. *State*, 1 Ohio State R. 185.

2. The allegation that the defendant had in his possession a certain promissory note is not supported by evidence that he had in his possession a bank note or bank bill. *State* v. *Ward*,

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6 N. H. 529. *State* v. *Hayden*, 15 N. H. 355. If "promissory note," under the Rev. Sts. *c.* 127, § 2, includes a bank bill of another state, then the punishment is twice as great for counterfeiting a bank bill of another state, as for counterfeiting a bill of a bank incorporated in this state, under § 6.

3. The variance between the word "Cashier" and the combination of letters "Cashr" is material. Whether words are *idem sonantia* is a question for the jury. *Regina* v. *Davis*, 1 Lead. Crim. Cas. 346.

4. It was a question of fact for the jury whether the erroneous spelling of the name of the cashier was or was not a variance. The parties did not treat this question as one for the court.

5. The objection to the irregularity in the finding of the indictment was taken seasonably, in a proper manner, supported by competent evidence, and the proceedings must be quashed. *Rex* v. *Dickinson*, Russ. & Ry. 401. *Low's case*, 4 Greenl. 439. *State* v. *Cain*, 1 Hawks, 352. *United States* v. *Coolidge*, 2 Gallis. 364. *The King* v. *Bridgewater & Taunton Canal*, 7 B. & C. 514. If this is regarded as an amendment of one of the former indictments, then it was amended after it had been returned into and made a part of the record of the court, and had passed out of the jurisdiction of the grand jury. If it is regarded as a new indictment, then it was found without evidence. The defendant was not tried for the same offence for which he stood indicted.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. 1. There is no legal ground for the objection that evidence tending to show that the bank note described in the indictment was originally a genuine note for one dollar, and had been fraudulently altered to one purporting to be for ten dollars, was incompetent under an indictment alleging a forgery of such ten dollar bank note. In a case like the present, the indictment is properly framed where it charges the defendant with having in his possession a forged promissory note, and uttering and passing the same as true, although the proof of the forgery be merely the false and fraudulent altering of a

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genuine bank note. If any part of a true instrument be altered, the indictment may allege it as a forgery of the whole instrument. 2 East P. C. 978. 2 Russell on Crimes, (7th Amer. ed.) 320. Archb. Crim. Pl. (13th ed.) 467. The distinction is, that where the forgery is of a mere addition to the instrument, which has not the effect of altering the instrument itself, but is merely collateral to it, the forgery must be specially alleged Archb. Crim. Pl. *ubi supra.*

2. The indictment properly describes the instrument alleged to have been forged to be "a promissory note." The instrument alleged to be forged was a bank bill of a bank incorporated and doing its business in another state. A careful examination of our statutes leads to the conclusion that there is no provision in terms for punishing the offence of uttering and publishing as true a counterfeit bill of another state, unless it is embraced in the general provision for punishing the offence of uttering and publishing forged and counterfeit promissory notes, knowing them to be such. The words used in the Rev. Sts. *c.* 127, § 2, are quite broad enough to include such bank bills or notes, and the only objection to thus applying them is that which arises from the fact that there are various provisions in other parts of this same chapter of the revised statutes, providing punishments and penalties for knowingly having bank bills in possession that are forged and counterfeit, with intent to pass them as genuine, as well as the further provision in § 6, for the punishment of uttering and publishing counterfeit bank bills of banks within the Commonwealth, and making the maximum of punishment in such latter case less than that provided in § 2, for uttering and publishing promissory notes.

This question is not a new one. Much the same question arose under the earlier *St.* of 1804, *c.* 120. It was somewhat considered in the case of *Brown* v. *Commonwealth*, 8 Mass. 59. The form of indictment was sanctioned in *Commonwealth* v. *Carey*, 2 Pick. 47, and again in the municipal court of Boston by Thacher, J. in *Commonwealth* v. *Riley*, Thach. C. C. 67, where the objection was taken that a bank bill was not a promissory note within the *St.* of 1804, *c.* 120, but it was said that the

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form of indictment was conformable to the practice in such cases in the highest criminal courts.

The Rev. Sts. c. 127, § 2, may, we think, be considered as equally authorizing this form of describing bank bills of other states in cases of indictment under it. The cases of *State* v. *Ward*, 6 N. H. 529, and *State* v. *Hayden*, 15 N. H. 355, hold differently, but under a statute having more distinct provisions for punishing the offence of uttering and publishing counterfeit bank bills of another state. As already remarked, we have no provision by statute for punishing this offence, unless it is found in the second section of c. 127 of the Rev. Sts., punishing the uttering and publishing of forged and counterfeit promissory notes. We think, under our practice heretofore recognized, and upon the proper construction to be given to c. 127 of the Rev. Sts. the form of the indictment was proper in the present case to authorize the admission of the evidence tending to prove the uttering and publishing counterfeit bank bills of another state, knowing them to be forged and counterfeit.

3. As to the question of variance, in that the indictment describes a bank bill purporting to be signed by C. R. Drown, "Cashier," whereas the bill offered in evidence purports to be signed by C. R. Drown, "Cash^{r}", using an abbreviated form of expression, we have no doubt great strictness is required in the recitals where, as in the present case, the indictment alleges the counterfeit promissory note "to be of the tenor following." But whether this would be such an error as would be fatal, we have not found it necessary to decide, as this objection applies only to the first count, and in the second count, charging the same offence, the description accords with that of the bank bill produced in evidence, and judgment may therefore be taken on that count.

4. Some objection was suggested to the manner of describing the name of the cashier; the defendant insisting that in the indictment the name of the cashier was spelt with the letter "u," viz: "Droun;" whereas upon the face of the bank bill offered in evidence it was spelt "Drown," and this was urged to be a variance. But we think it would savor quite too much of nicety

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to attempt to distinguish between the two letters as they appear in the present case, or to say that the name, as set forth in this indictment, did not correspond with the name as written on the face of the bank bill.

We perceive no legal objection to the course of proceedings in reference to the finding of the present indictment, nor any ground for arresting the judgment for that cause, if there were not other objections to taking this point.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM THOMAS.

A bill of a bank in another state is a promissory note, within the meaning of the Rev. Sts. c. 127, § 2.

Knowingly having in possession and uttering five false, forged and counterfeit promissory notes, may be charged as one offence in one count.

An indictment is not repugnant and defective, which charges the defendant with the possession of five false, forged and counterfeit promissory notes, and then sets forth certain bills of a bank in another state, and alleges that the defendant "did utter and publish the aforesaid false, forged and counterfeit bank bills as true."

An indictment for having in possession and uttering five counterfeit notes, which sets out four notes, alleges that the fifth "is different from any above set forth," and then sets out one like two of the others, is sufficient to support a conviction.

INDICTMENT on the Rev. Sts. c. 127, § 2, alleging that the defendant "had in his custody and possession sundry false, forged and counterfeit promissory notes, which the said Thomas then and there well knew to be false, forged and counterfeit, which said false, forged and counterfeit promissory notes were five in number, one of which said false, forged and counterfeit promissory notes was of the tenor following, that is to say." The indictment then set forth successively four bank bills of the Hamilton Bank in Rhode Island, and proceeded thus: "One other of which false, forged and counterfeit promissory notes, different from any above set forth, is of the tenor following," and set forth a bank bill similar to two of the previous ones. "And that the said Thomas then and there did utter and pub-

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lish the aforesaid false, forged and counterfeit bank bills as true, he the said Thomas then and there so uttering and publishing said bank bills, knowing the same to be false, forged and counterfeit, with intent then and there to injure and defraud."

After trial and conviction in the municipal court of Boston, at May term 1857, *Nash*, J. overruled a motion made in arrest of judgment upon grounds stated in the opinion. The defendant alleged exceptions.

J. C. Park, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Dewey, J. The principal question arising in the present case is, whether an offence under the Rev. Sts. *c.* 127, § 2, is charged in this indictment. It charges in the terms of the statute the uttering and publishing of "sundry false, forged and counterfeit promissory notes," but in describing such promissory notes, it describes five bank notes of the Hamilton Bank in the State of Rhode Island, and the inquiry is, whether such uttering and publishing of forged and counterfeit bank bills of another state is a statute offence, and if so, whether it is properly charged by the description of the instruments as forged and counterfeit promissory notes? This question has been settled in the case of *Commonwealth* v. *Woods*, also argued at the present term, in the affirmative, and for the reasons of that opinion we refer to that case, *ante*, 477.

The further ground of objection to this indictment, that it charges various offences in one count, is not sustained by the fact. The indictment, as it was competent to do, charges as one offence the having in possession and uttering and publishing of several counterfeit bank bills, and a verdict of guilty may properly be rendered upon the whole charge, or upon part, as the evidence may authorize. When set forth in one count, it is however to be treated as one offence.

It is also said that there is a repugnancy and uncertainty in the allegation as to the uttering and publishing said "bank bills," whereas they had been originally set forth in the indictment merely as "promissory notes." This is true, if you confine the description to the first recital of having in possession "sun-

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dry forged and counterfeit promissory notes;" but the indictment further proceeds to set them out as "of the tenor following," describing them by exact recitals, and thus showing them to be bank notes or bills, and properly lay the foundation for the further allegation of uttering and publishing said bank bills.

Nor is there any ground for the further objection that the last of the five described notes is alleged to be different from the others, while in its recital it corresponds with two of those previously described. It would fully satisfy the terms of the allegation, that it was another and different bank bill, though of a similar form with the preceding. *Exceptions overruled.*

COMMONWEALTH *vs.* ABIJAH JENKINS.

On the trial of an indictment for receiving stolen goods, evidence is admissible of conversations between the defendant and the thief, before the commission of the offence, making arrangements for receiving the goods.

A witness, who has been impeached by evidance that he previously testified differently, cannot be corroborated by evidence that he had made still earlier statements, not under oath nor in the prisoner's presence, in accordance with his present testimony.

Whether it is ground for setting aside a verdict, that one of the jurors was not an inhabitant of the county, and that this was not known before verdict to the party against whom the verdict was rendered — *quære.*

INDICTMENT for receiving stolen goods. At the trial in the municipal court of Boston, at March term 1858, before *Huntington*, J., the attorney for Commonwealth called as a witness Graham, one of the persons alleged to have stolen the goods, who testified that he and others stole the goods and sold them to the defendant, and that, while selling them, he told the defendant that the goods were stolen, and the name of the person from whom they were stolen.

The attorney then asked the witness whether, before this sale, the defendant had made any agreement to purchase any stolen goods which the witness might bring to him. The defendant objected to this question; but the court overruled the objection; and the witness testified that he had had previous interviews

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with the defendant, at the last of which, about six weeks before the sale, the defendant had told the witness that he would buy any stolen goods which the witness might bring him; that it was not safe to carry them to other brokers; they might get detected.

It appeared that Graham had been called as a witness in the police court, on the preliminary examination of this charge against the defendant.

The defendant's counsel attempted to show, by cross-examination of this and other witnesses, that Graham, in testifying in the police court, had given a different account of the transaction from that now given by him. The defendant's counsel however put no question to Graham or any other witness, as to Graham's statements about the transactions in question, at any other time than in his testimony in the police court; nor did they ask him, or any person, when Graham first communicated the facts testified to by him to any one, or whether he had ever made any such communications to any one, other than that made in the police court.

The attorney for the Commonwealth then, for the purpose of confirming and corroborating the testimony of Graham at this trial, was allowed by the court, notwithstanding the defendant's objection, to introduce evidence that Graham, on another occasion, when not under oath, and when the defendant was not present, before the examination in the police court, had given substantially the same account of the transaction as that now given by him.

After a verdict of guilty, the defendant moved that it be set aside and a new trial granted, because one of the jurors, returned as a citizen of Boston, was not, at the time of the trial, or when drawn as juror, an inhabitant of the county of Suffolk, but had been for a long time an inhabitant of Charlestown in the county of Middlesex; and because this fact was unknown to the defendant or his counsel until after the verdict. But the court declined to hear evidence of this fact, and overruled the motion.

To these several rulings and proceedings of the court the defendant excepted.

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J. G. Abbott & D. H. Mason, for the defendant, upon the admission of the evidence to corroborate Graham, cited the authorities referred to in the opinion, and 2 Russell on Crimes, (7th Amer. ed.) 940; 4 Macaulay's Hist. Eng. 676, 677; *Deshon* v. *Merchants' Ins. Co.* 11 Met. 199; *Howe* v. *Thayer*, 17 Pick. 91; *The King* v. *Parker*, 3 Doug. 242; *Craig* v. *Craig*, 5 Rawle, 97, 98; *Munson* v. *Hastings*, 12 Verm. 346; *Gibbs* v. *Linsley*, 13 Verm. 208.

S. H. Phillips, (Attorney General,) & *G. W. Cooley*, (County Attorney,) for the Commonwealth, upon the same point, cited *Commonwealth* v. *Wilson*, 1 Gray, 340; *Deshon* v. *Merchants' Ins. Co.* 11 Met. 209, 210; *Lutterel* v. *Reynell*, 1 Mod. 282; *Freind's case*, 13 Howell's State Trials, 32; *French* v. *Merrill*, 6 N. H. 465; *Henderson* v. *Jones*, 10 S. & R. 322; *People* v. *Vane*, 12 Wend. 78; *Robb* v. *Hackley*, 23 Wend. 50; *Cooke* v. *Curtis*, 6 Har. & Johns. 93; *Coffin* v. *Anderson*, 4 Blackf. 395; *Beauchamp* v. *State*, 6 Blackf. 299; *Wright* v. *Dehlyne*, Pet. C. C. 199; *State* v. *George*, 8 Ired. 324; *State* v. *Dove*, 10 Ired. 469; *March* v. *Harrell*, 1 Jones N. C. 329.

Bigelow, J. 1. Evidence of the conversation between the defendant and one of the principals in the larceny of the goods, which the defendant was alleged to have received, was clearly competent. Although the conversation took place several weeks before the commission of the crime charged in the indictment, it had nevertheless a direct tendency to prove the guilty knowledge of the defendant in receiving the stolen property. Indeed, if believed, it proved that the goods were taken by the defendant into his possession in pursuance of a previous understanding with one of the principal thieves, that he would receive any stolen property which he would bring to him. It is no objection to the competency of this evidence, that it was cumulative, and that the same witness testified to other facts which also tended very strongly to show the defendant's guilt. The court cannot reject evidence, which is legally competent and relevant to the issue, merely because in their judgment it may be superfluous.

2. The more interesting and important question presented by

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the exceptions arises on the admissibility of evidence offered by the government of statements of the accomplice, who was a witness in support of the indictment, to third persons, concerning the transactions to which he had testified at the trial. The purpose of the government in offering these statements was to corroborate the testimony of the accomplice, which the defendant had sought to invalidate and discredit by proof that on the preliminary examination before the police court the witness had given a different account of his interviews and dealings with the defendant from that to which he had testified before the jury. Although there is some contrariety of opinion in the books on the question of the competency of such evidence, it seems to us that on principle it ought to be excluded. It has no legitimate or logical tendency to establish the corroboration for which it is offered. How did the case stand on the evidence of the accomplice, when the government offered the statements objected to? He had testified in behalf of the government to an account of his dealings with the defendant concerning the stolen property. The counsel for the defendant then called witnesses to show that at a previous time he had given under oath a different account of this same transaction. This evidence was offered, not for the purpose of proving the truth of such previous statements, but to show that he was unworthy of belief, inasmuch as he had given two inconsistent accounts of the same transaction, one of which was necessarily untrue. From such evidence the inference was fair and legitimate that the testimony of the witness before the jury was not to be relied on. Standing by itself, it would be difficult, if not impossible, for the jury to believe it, with the fact before them that he had made a statement before the police court, which was inconsistent with his present testimony and contradictory to it. It did not relieve the difficulty, or in any degree corroborate the last story told by the witness, to show that previously he had made similar statements of the transaction. The discredit arising from the fact that he had made contradictory statements remained untouched. The contradiction was not disproved by such evidence, and this was all that the prior statements was offered to establish. Clearly

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evidence of such prior statements was not competent as substantive proof; it was purely hearsay. It was only admissible to support the credit of the witness. The utmost that could be claimed for it in this view would be, that it rendered the last statement more probable and worthy of credit, because, although the witness had made a contradictory statement, he had made another statement similar to those to which he had testified before the jury. But such a corroboration is altogether too slight and remote. Indeed, if admitted and followed out to its legitimate result, it might properly lead to a protracted inquiry to ascertain which of the two statements had been made most frequently by the witness; and when this was determined, then it would be necessary to ask the jury to believe the witness, if he had repeated the statement made before them a greater number of times than the contradictory one which had been proved to impeach his evidence. It is obvious that such a course of inquiry would furnish no means by which the credit due to the testimony of a witness could be satisfactorily ascertained. 1 Greenl. Ev. § 469. 2 Phil. Ev. (3d Amer ed.) 445. 1 Stark. Ev. (1st Amer. ed.) 147. 3 Stark. Ev. 1758. Bul. N. P. 294. *Ware* v. *Ware*, 8 Greenl. 42. *Robb* v. *Hackley*, 23 Wend. 50. *Dudley* v. *Bolles*, 24 Wend. 465.

The decision of the point raised in this case is not to be understood as conflicting with a class of cases, in which a witness is sought to be impeached, by cross-examination or by independent evidence, tending to show that at the time of giving his evidence he is under a strong bias or in such a situation as to put him under a sort of moral duress to testify in a particular way. In such case, it is competent to rebut this ground of impeachment and to support the credit of the witnesses by showing that, when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial. Another similar class of decisions, resting on a like principle, is also to be distinguished from the case at bar, namely, when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified. In

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such cases, it is competent to show that the witness, at an early day, as soon as a disclosure could reasonably have been made, did declare the facts to which he has testified. Such is substance was the case of *Commonwealth* v. *Wilson*, 1 Gray, 340. The statement in the exceptions, of the circumstances under which the evidence objected to in this case was admitted, carefully excludes all facts which would bring it within either of the above classes of decisions.

3. As the case must go to a new jury, it is not necessary to consider the question raised in relation to the alleged incompetency of one of the jurors who composed the panel by which the prisoner was tried. *Exceptions sustained.*

ALEXANDER WASS *vs.* WILLIAM S. BARTLETT.

A defendant arrested on mesne process, and refused the poor debtors' oath, is entitled to give a bail bond under *St.* 1857, *c.* 141, § 22.

HABEAS CORPUS. The petitioner was arrested on mesne process and taken before a magistrate under *St.* 1857, *c.* 141, § 21, who refused to administer to him the poor debtors' oath. Upon being committed to jail, he offered to give a bail bond, which was refused, and this writ was sued out.

A. S. Wheeler, for the petitioner.

B. Dean, for the creditor.

BY THE COURT. The provision of *St.* 1857, *c.* 141, § 21, that a debtor arrested on mesne process, and carried before a magistrate, and by him refused the poor debtor's oath, and committed to jail, shall be "there kept until final judgment in the suit in which he was arrested," is qualified by the subsequent provision "unless he shall" do one of certain acts, one of which is giving a bail bond according to § 22. *Prisoner discharged.*

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MOORE R. FLETCHER *vs.* WILLIAM S. BARTLETT.

A magistrate's refusal of an application to be admitted to take the poor debtors' oath, under *St.* 1857, *c.* 141, upon the ground that the debtor has property, is conclusive; and an appeal taken from the decision of the magistrate, finding him guilty upon charges of fraud filed at the same time, does not exempt him from arrest on the execution.

PETITION for a writ of *habeas corpus*, in behalf of a poor debtor, who, after being arrested on execution, entered into a recognizance under *St.* 1857, *c.* 141, § 10, for his surrender within ninety days; and applied to a master in chancery to be admitted to take the poor debtors' oath; whereupon the creditor filed charges of fraud against him, and the master refused to administer the oath to him, on the ground that he possessed property, and also convicted him upon the charges of fraud and sentenced him accordingly. From this judgment he appealed, and entered into a recognizance under § 14 of the statute to prosecute his appeal, and was afterwards rearrested on the same execution.

D. E. Ware, for the petitioner.

H. C. Hutchins, for the creditor.

SHAW, C. J., to whom this petition was presented, after consulting *Metcalf* and *Bigelow*, JJ., expressed the opinion that the proceedings upon allegations of fraud were distinct from the ordinary proceedings upon an application to be admitted to take the poor debtors' oath; that the ordinary inquiry upon such an examination was, whether the debtor had property, and if he had, the oath was refused, and from the decision of the magistrate on this point there was no appeal; that allegations of fraud, if filed, raised distinct issues, from the decision of the magistrate upon which both creditor and debtor had a right of appeal; that such appeal did not carry up the whole case, but only the finding upon the charge of fraud. *Petition dismissed.*

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Matthew Starbuck *vs.* John H. Shaw.

In the absence of any special agreement or usage, one partowner of a ship, who has contributed with the others, in proportion to their interests, to her outfit for a whaling voyage, is not liable, while the adventure is unfinished, to an action at law for his proportion of the amount of a bill of exchange drawn by the master in a foreign port upon the managing owner and paid by him; and such liability is not therefore the subject of a set-off in an action at law.

Action of contract on a promissory note payable to the plaintiff or order. The defendant filed a declaration in set-off, alleging that the plaintiff was a joint owner with him and others of the Ship Barclay, the plaintiff owning one eighth; that the master of the ship drew a bill of exchange for $2384.48 on the defendant as agent of the owners of the vessel, for her use in a foreign port, and for other expenses of the voyage, which bill was paid by the defendant; and that the plaintiff owed the defendant the sum of $438.82, being the plaintiff's contributory share of the amount of that bill.

Trial in the court of common pleas at Nantucket at October term 1857, before *Sanger*, J., who signed a bill of exceptions, which stated the pleadings, and the residue of which was as follows: "The plaintiff asked the court to rule that the foregoing claim of the defendant was not a legal matter of set-off to the plaintiff's action. But the court ruled that it was a proper matter of set-off, and the jury found a verdict for the defendant in the sum of $139.04; and to this ruling the plaintiff excepted."

S. Bartlett, for the plaintiff, cited *Holderness* v. *Shackels*, 8 B. & C. 612; *Nicoll* v. *Mumford*, 4 Johns. Ch. 522 and 20 Johns. 611; *Williams* v. *Henshaw*, 11 Pick. 79; Story on Part. §§ 408, 443, 444.

J. C. Stone, for the defendant, cited Abbott on Shipping, (7th ed.) 107; Story on Part. §§ 419, 440; Collyer on Part. book 5, *c.* 3, sect. 4.

Bigelow, J. The only question in this case is, whether the defendant can maintain his claim in set-off. It was stated at

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the argument of the case, and admitted by the counsel for the respective parties, although not fully set out in the bill of exceptions, that the debt which the defendant seeks to prove in set-off to the plaintiff's claim upon the note declared on was incurred under the following circumstances: The plaintiff and defendant together with sundry other persons are part-owners of a ship called the Barclay, in different proportions, the plaintiff being the owner of one eighth; the ship was fitted out for a whaling voyage in distant seas; the owners of the vessel were jointly interested in the adventure or voyage in the same proportions in which they own the vessel, and contributed in like proportion towards the expenses and charges of preparing the vessel and procuring her outfits, and are to share in the profits and losses resulting from it accordingly; the defendant is the managing owner, and as such the agent of the other owners for fitting out and preparing the vessel, paying the necessary charges and expenses incurred during the prosecution of the adventure, receiving the catchings or proceeds, and settling up the accounts of the respective owners with each other at the termination of the voyage; the voyage has not yet been completed; and the debt which is now claimed to be set off in this suit was the proportion or share, being one eighth, which the plaintiff was bound to pay, as one of the partners jointly interested in the voyage, of a certain bill of exchange drawn on the plaintiff by the master of the vessel, to enable him to pay for supplies furnished to the vessel in a foreign port, and which had been paid by the plaintiff.

Upon these facts, which are not controverted, it seems to be very clear that the parties, so far as this voyage and adventure are concerned, sustain towards each other the relation of copartners. They are jointly interested in a mercantile enterprise to which they have respectively contributed in certain proportions their capital; they are joint owners of the property embarked in the transaction, and are to share the profits and losses which may result from the joint business in which they have engaged. The elementary definition of a partnership is an agreement between two or more persons to share the profits and losses of

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their joint undertaking, whether it have reference to a trade or business, or merely to some particular adventure.

Such being the legal relation of the parties, in the absence of any proof of a special agreement between them, or of a usage or custom of trade which changes their relative rights and liabilities, it is clear that the defendant cannot maintain his set-off. He has no right of action at law against the plaintiff. While the partnership is still in existence and its affairs are unsettled, and the result of the joint business or undertaking is unknown and uncertain, one copartner cannot maintain an action at law against his copartner to recover money advanced by him in carrying on the joint business beyond the just proportion which he is bound to pay. It is only after a dissolution of a copartnership, when there is a balance due after all the debts of the firm are paid, so that the recovery of this balance due to one of the firm from his copartners will effect a final settlement between the copartners, that an action at law can be maintained by one copartner against another. *Sikes* v. *Work*, 6 Gray, 433, & cases cited. *Shattuck* v. *Lawson*, *ante*, 407.

It is quite possible that the defendant may be able to prove at another trial that a usage prevails in the conduct and management of the whale fishery, which will authorize him to require immediate payment by his copartners of advances made under circumstances such as were disclosed by the evidence in this case. But no such usage was attempted to be proved at the trial, and the counsel for the plaintiff do not admit its existence.

Exceptions sustained.

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Seth Adams & another *vs.* Boston Iron Company.

A contract to build and set up engines for a corporation was made with them through their agent, who became insolvent before the engines were completed, and the contractor thereupon, supposing the principals to be involved in their agent's insolvency, stopped his work, carried away parts of the engines already set up, and gave notice that he should not complete the engines without further security, and the corporation told him that they did not consider themselves bound by the contract. *Held*, that the contract was discharged, and could not be enforced against the corporation without evidence of a new agreement by them that the contractor should go on and complete it.

Action of contract upon an agreement in writing, made with the plaintiffs by the defendants through Horace Gray, their treasurer and general agent, in December 1846, to build four steam engines and set them up at South Boston on or before the 1st of July 1847; the defendants agreeing on their part to have the foundations ready six weeks before, and to pay for the engines, one half in April 1847, and the other half within thirty days after they should be completed and set up.

At the trial before *Merrick*, J., one of the plaintiffs testified that they were paid half the price by Gray in April 1847, finished two of the engines in July or August 1847, and went on with the others as fast as the foundations were ready to receive them; that in November 1847, the last two engines not being yet completed, but so far advanced that they would have been finished and started in a day or two, Gray became insolvent; that the plaintiffs then, supposing the defendants to be involved in the insolvency of their agent, and in order to make themselves as safe as possible, took away such parts of the engines already set up as could easily be removed; that the witness asked the defendants' treasurer, appointed after the failure, whether the defendants wished the plaintiffs to complete and finish the engines according to the agreement, and in reply was told that the corporation never made nor were bound by any agreement with the plaintiffs. There was no evidence that the defendants gave any subsequent consent to the completion of

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the work, or assumed any further liability. But it appeared that the plaintiffs afterwards completed the engines for the Massachusetts Iron Company, to whom these works belonged, reserving all the plaintiffs' rights against these defendants.

The defendants contended that the agreement was discharged by the refusal of the plaintiffs to continue the work, and could not be held binding on the defendants, without proof of some subsequent agreement by them, and that there was no evidence which would sustain a verdict for the plaintiffs. And of this opinion was the presiding judge. A verdict was taken for the defendants accordingly, and his ruling was now confirmed by the whole court.

R. Choate & C. W. Loring, for the plaintiffs.

E. R. Hoar, for the defendants.

City of Boston *vs.* Roland Worthington & others.

A verdict and judgment against a city, in an action for personal injuries occasioned by a defect within the limits of a highway, are conclusive evidence in a subsequent action by the city against a tenant of the land (who had notice of the pendency of the former action and of the city's intention to hold him responsible for all damages recovered therein, and had opportunity to furnish evidence, and testified at the trial, although he was not requested to and did not take upon himself the defence of that action) that the highway was defective, that the person was injured there, while using due care, and of the amount of the injury; but not of the tenant's liability to keep the place in repair, nor of his having neglected to do so, nor of such negligence having been the sole cause of the injury.

A covenant in a lease "that no alteration or addition shall be made in or to the premises without the consent of the lessor" does not relieve the lessee from liability for injuries resulting to a third person from want of repair of the premises.

Action of tort, to recover the amount of a judgment recovered in this court by George F. Southwick against the plaintiffs, who paid the amount to him. Trial before *Bigelow*, J., who reported the following case:

"Southwick alleged in his declaration against these plaintiffs that he was greatly injured in his person, by falling into a cellar

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way in Congress Square, one of the public streets or highways in Boston, which the city was bound to keep in proper repair and in safe condition for public travel; that he fell into this cellar way, while he was passing through Congress Square, and using due care, by reason of the cellar way projecting into the highway and not being properly protected or guarded by railing or otherwise.

"After the commencement of the suit by Southwick, the plaintiffs notified the defendants of the pendency thereof; that they might furnish any evidence they had or could procure in defence thereof; and that the plaintiffs would hold the defendants responsible for all damages which Southwick should recover against the plaintiffs in that action.* Two of the defendants were present at the trial, and testified therein. Southwick recovered in that action the amount of $12.000 damages and $257.82 costs.

"The defendants, at the time when Southwick met with this accident, were the tenants of a portion of the building and of the cellar under the same in Congress Square, leading to the cellar of the brick building, which was the cellar way into which Southwick fell; and they held their portion of the premises under a lease, in which they covenanted 'that no alterations or additions shall be made during the term aforesaid in or to the same, without the consent of the lessors, or of those having their estate in the premises, being first obtained in writing.'

"The defect in the cellar way was, that it was not covered

* City Solicitor's Office, October 15, 1852.

Messrs. Worthington, Flanders & Co., Proprietors and Publishers of the Traveller. Gentlemen: George F. Southwick of Boston has brought an action against the city of Boston, by writ returnable at the next November term of the supreme judicial court, to recover damages for an injury which he alleges he received by an alleged defect in the highway called Congress Square, in a place understood to be occupied by you. The accident is alleged to have occurred on the 20th day of August last, and damages have been laid at $30,000. You will please to take notice that the city will hold those responsible who had the charge and custody of the place of the accident. You will govern yourselves accordingly.

Very respectfully your obedient servant,

P. W. Chandler, City Solicitor.

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nor protected by a railing three feet high above the sidewalk, as required by the ordinances of the city, and it had been in the same state for over twenty years. [Ordinances of Boston of 1850, p. 528.]

"The plaintiffs contended that the defendants were, under the circumstances above stated, concluded by the judgment of Southwick against them, and all matters therein adjudicated; and that they were estopped to deny the same, or their liability to pay the plaintiffs the amount thereof; and they offered no evidence to support their case, except said judgment.

"The defendants contended that they had not such an estate, in the building and premises occupied by them, as made them liable for the defect in the cellar way, and that they had no control or authority to alter it; and that if they then were so liable, by reason of their tenancy as aforesaid, they were not concluded by the judgment of Southwick against the plaintiffs, but were at liberty, in the trial of this action, to traverse every fact adjudicated therein, except the amount of damages recovered.

"A verdict was returned for the defendants by consent, with the agreement that if, under the lease aforesaid, the defendants were responsible for the condition of the cellar way, and if the judgment aforesaid was sufficient evidence to sustain the plaintiffs' allegations, without further proof, then the verdict should be set aside, and a new trial ordered; otherwise, judgment to be rendered for the defendants on the verdict."

G. S. Hillard & J. P. Healy, for the plaintiffs.

R. Choate & H. F. Durant, for the defendants.

METCALF, J. Southwick's judgment against the plaintiffs is conclusive against the defendants, as to all the facts thereby established, provided the defendants had due notice of the pendency of the action in which that judgment was recovered, and had an opportunity to defend it. So far the adjudications are decisive. In *Littleton* v. *Richardson*, 34 N. H. 187, Bell, J. thus states the law: "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon

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him the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not." In addition to the authorities there cited in support of this position, see *Clark* v. *Carrington*, 7 Cranch, 322; *Hamilton* v. *Cutts*, 4 Mass. 353; *Bond* v. *Ward*, 1 Nott & McCord, 201; *Kip* v. *Brigham*, 6 Johns. 158.

It is not denied by the defendants, and cannot be, that they are responsible over to the plaintiffs, by operation of law, if the plaintiffs were held answerable to Southwick by reason of the sole fault of the defendants. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24. *Lowell* v. *Short*, 4 Cush. 275. *Lowell* v. *Spaulding*, 4 Cush. 277.

Had the defendants such notice of the pendency of Southwick's action, as renders the judgment recovered therein conclusive against them, to any extent? We are of opinion that they had. They were informed when Southwick's writ was returnable; that he had sued for an injury received on a day named, by a defect in the highway, called Congress Square, in a place occupied by them; they were directed to take notice that the plaintiffs would hold those responsible who had the charge and custody of the place of the accident; and they were required to govern themselves accordingly. They were not, in terms, requested to take upon themselves the defence of that action. And this was not necessary in order to render the judgment conclusive against them as to the facts thereby established. *Blasdale* v. *Babcock*, 1 Johns. 517. *Barney* v. *Dewey*, 13 Johns. 226. *Warner* v. *McGary*, 4 Verm. 508. *Beers* v. *Pinney*, 12 Wend. 309. The defendants, by the notice given to them of Southwick's action, had an opportunity to defend it, and the case shows that they "were present at the trial, and testified therein." This fact, according to Spencer, J. in 13 Johns. *ubi sup.* is sufficient to show such notice as to render the judgment conclusive against them.

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The defect in the highway, for which the plaintiffs were made answerable to Southwick, was an uncovered cellar way, not protected by such a railing as was required by the ordinances of the city; and this defect existed before the defendants occupied the place of the accident. And they contend that they had no legal right to remedy that defect, and therefore are not responsible for it, because their lease provided that no alterations nor additions should be made by them, without the written consent of their lessors. But we have no doubt that the repairing of a defect is not an alteration nor an addition, within the meaning of the lease. Nor do we suppose that a covenant by the defendants, with their lessors, to continue a nuisance, would exonerate them from liability to third persons, or to the Commonwealth, for its continuance.

The judgment recovered by Southwick against the plaintiffs is conclusive against these defendants, on three points: That the highway in Congress Square was defective; that Southwick was injured there, while using due care; and that he suffered damage to the amount of twelve thousand dollars. But it is not conclusive against the defendants on the question whether they were bound to keep the highway safe, or, if they were, that they were guilty of such negligence as would charge them in this suit, or would have charged them, if Southwick had brought an action against them; nor on the question whether Southwick's damage was caused by their sole fault.

On a new trial of this action, which must be ordered, the defendants may be permitted to show that they were not bound to make the highway safe, or, if they were, that Southwick's injury was not caused solely, if at all, by their default. If it was caused by the joint fault of the plaintiffs and defendants, the plaintiffs cannot recover. One of two joint wrongdoers cannot have either indemnity or contribution from the other, although he may have been compelled to pay the whole amount of the damage caused by their joint wrong. *New trial ordered.*

Upon a new trial at this term, a verdict was returned for the defendants, on which judgment was rendered.

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EDWARD MINTURN *vs.* MANUFACTURERS' INSURANCE COMPANY.

It seems, that under the *St.* of 1852, *c.* 312, a demurrer to part of one count in a declaration is inadmissible, even if the matters alleged are divisible in their nature. But if admissible, it goes merely to the manner of stating the cause of action, and cannot be argued before the full court, until the whole case has been tried by a single judge.

This indorsement upon a policy of insurance, "Pay under the within policy to J. S. or order," is only an order to pay him the amount of any loss, and not an assignment of the policy; and if the policy stipulates that it shall "be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers," an assignment of the policy and assent of the insurers cannot be shown by oral evidence.

ACTION OF CONTRACT, brought in this court, upon a policy of insurance, whereby the defendants insured "Jones & Johnson, payable to them for whom it concerns, $3800; namely, $1100 on one hundred and seventy tons coal, and $2700 on the freight on the same, on board of Brig Oriental, at and from New York to San Francisco."

The policy contained this stipulation: "It is agreed that this policy shall be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers;" and bore these indorsements:

"Pay under the within policy to O. W. Pollitz or order,
"Jones & Johnson."

"May 24th 1850. Assented to. C. W. Cartwright, Pres't."

"June 10th 1850. Pay under the within policy to Edward Minturn or order. O. W. Pollitz."

"November 7th 1850. The Oriental having deviated, by an unreasonable delay in getting to sea, this company, in consideration of seventy six dollars additional premium, waive all objections on account of such delay. C. W. Cartwright, Pres't."

The declaration alleged that the policy was effected by Jones & Johnson as agents for Otto W. Pollitz, and by them assigned to him; that Pollitz had previously shipped the coal on the brig and paid the freight, and had since, with the defendants' assent in writing, and before the loss, sold and assigned to the plaintiff the coal, the advance freight, and the policy.

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The defendants in their answer demurred to so much of the declaration as related to freight, and for cause of demurrer assigned that it did not appear by the declaration that the plaintiff had any insurable interest therein; and answered on the merits to the rest of the declaration.

This point was disposed of at November term 1855.

R. Fletcher & S. Bartlett, for the defendants. The demurrer presents the question whether Pollitz, not being an owner of, or interested in, the brig, had any insurable interest in the freight insured by the policy, so that the plaintiff, claiming under him, can recover that freight in this action. [THOMAS, J. How can this demurrer be argued now? The whole case is not here, and we cannot hear it in fragments. The demurrer is to part of the cause of action, to a part even of one count. If the action had been commenced in the court of common pleas, and that court had ruled upon the demurrer, the case could not have been brought to this court, because there would still be an issue of fact pending in the court of common pleas. Precisely the same difficulty occurs here. The case stands at *nisi prius*.] A demurrer may be to part of the declaration, or to part of a count, provided the matters alleged are divisible in their nature. 1 Chit. Pl. (6th Amer. ed.) 703. By the new practice act, in personal actions, "the general issue is abolished, and in place thereof the defendant shall file an answer to the declaration;" and "to raise an issue in law, the answer shall contain the statement that the defendant demurs to the declaration, or to some one or more counts therein, as the case may be, and shall assign specially the causes of demurrer." *St.* 1852, *c.* 312, §§ 12, 17. But that act does not change the previous practice, except in the manner of taking issues. The court of common pleas may settle the order of the trial of issues of law and of fact, in cases pending before them, as they please; and a case cannot be removed from that court to this, by exceptions or appeal, until the whole case is disposed of. But this case has always been in this court. And in this court "all issues of law shall be heard and determined exclusively in the full court." Rev. Sts. *c.* 81, § 13. The case must be tried in fragments; if the issue of fact were tried first,

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it must be tried by itself, by a single judge and a jury; and then the issue of law would have to be heard by the full court, and if the demurrer were overruled, the case might go back again for a trial of the facts involved in that part of the case to which the demurrer applied. The practice of this court has always been to hear the issue of law first, for the reason that the determination of that would often render a trial of the facts unnecessary. Section 23 of the practice act provides that "every demurrer may, in the first instance, be heard by a single justice; and his decision as to the verification of an allegation or the misjoinder of counts shall be final, an amendment being allowed as hereinafter provided. But if the cause of demurrer shall be that the facts stated do not in point of law support or answer the action, and the party against whom the decision shall be made shall not pray for leave to amend, the decision of such single justice shall not be final, but such demurrer may be further heard, upon appeal or otherwise, as is now provided in respect to such questions of law," that is to say, by the full court. But this section does not require that every demurrer shall be heard by a single judge, when his decision would not be final.

C. P. Curtis, for the plaintiff, was stopped by the court.

SHAW, C. J.* By § 23 of the practice act, (St. 1852, *c.* 312,) if a demurrer goes to the whole cause of action, that is, if it raises a question of law on the merits, the decision of a single judge is not final, but may be revised by the full court. But if the demurrer goes to delay, being taken as to matters of form merely, the decision of the single judge is final. The mention of "the verification of an allegation" in this section, was inadvertently retained, the provision, in the act as reported by the commissioners, requiring pleadings to be verified by the oath of the party, having been stricken out by the legislature in the original practice act of 1851, *c.* 233.

This demurrer is to part only of the cause of action stated in one count, and is therefore inadmissible; or if admissible, it goes

* BIGELOW, J. did not sit in this case.

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to the manner in which the cause of action is stated, and is to be passed upon by a single judge. Whenever the cause of demurrer is that the facts alleged will not support the action, that is a question on which the whole court are to pass. Anything short of that goes to the form of the declaration, and the decision of a single judge thereon is final.

The defendants then had leave to withdraw the demurrer, and amend their answer, and the case was tried at March term 1857, before *Merrick*, J., who reported, for the decision of the whole court, the following case:

"In addition to the policy and the indorsements thereon, and some other evidence not necessary now to make mention of, the plaintiff produced evidence to show that, at the time of the issuing of this policy, Otto W. Pollitz and John Codman were the owners of the coal insured, and had prepaid the freight thereof, at the rate of sixteen dollars per ton, from New York to San Francisco; that the said insurance was made and the said policy procured at their instance and for their benefit, and that they paid the premium charged and received by the defendants therefor; that subsequently, but before the Oriental left New York, to wit, on or about the 10th of June 1850, the coal insured and the prepaid freight were sold and conveyed by Pollitz, for himself and Codman, to the plaintiff, and the indorsement on the policy was at the same time signed by Pollitz.

"John S. Tyler, called as a witness for the plaintiff, testified that he paid to the defendants the seventy six dollars additional premium mentioned in the indorsement on said policy, dated November 7th 1850, for the plaintiff, and afterwards drew on him for the same, and received that amount of him therefor. The plaintiff offered to prove by this witness that he, at the time of making said payment, informed the defendants that he made it for and on account of the plaintiff; but this part of his proposed testimony, being objected to as incompetent by the defendants, was excluded by the court.

"The defendants thereupon objected that this action could not be maintained upon the evidence produced by the plaintiff.

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1st, because he had not shown any contract between themselves and him, or any assignment of said policy to him; and, 2dly, because he had not shown that if said policy had at any time been assigned to him, the defendants had ever assented in writing thereto.

"The defendants also objected that the plaintiff could, in no event, recover anything on account of the freight of said coal or the prepayment thereof." *

Curtis & C. P. Curtis, Jr. for the plaintiff. 1. The indorsement of the 10th of June is a sufficient assignment, if assented to by the defendants, to entitle the plaintiff to recover under the policy. *Wiggin* v. *American Ins. Co.* 18 Pick. 158. *Tolman* v. *Manufacturers' Ins. Co.* 1 Cush. 73. *Hartley* v. *Tapley*, 2 Gray, 565. It is in the nature of a power of attorney irrevocable, coupled with an interest; and the indorsement of the 7th of November, having been afterwards written on the polic without objection, is to be regarded either as an assent by the underwriters, or a waiver of the necessity of a written assent.

2. The indorsement of November 7th has a twofold character. Like a bill of lading, it is both a receipt and a contract. Tyler's testimony was competent to show from whom the money was received; that is, to explain that part of the bill of lading which is a receipt. *Brooks* v. *White*, 2 Met. 283. *Gerrish* v. *Washburn*, 9 Pick. 338. *Barrett* v. *Union Mutual Fire Ins. Co.* 7 Cush. 175. *O'Brien* v. *Gilchrist*, 34 Maine, 554. 1 Greenl. Ev. §§ 297, 305. Browne on St. of Frauds, § 91. 2 Parsons on Con. 67.

Fletcher & S. E. Sewall, for the defendants.

The opinion was delivered at March term 1859.

Dewey, J. Upon the well settled principles of the insurance law, the policy procured in behalf of Pollitz and Codman upon their property and interests, was a policy for their benefit. It was however not only essential that they should have an interest in the subject of the insurance at the time of receiving the policy, but this interest of the assured must continue and be

* See *Minturn* v. *Warren Ins. Co.* 2 Allen, 86.

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subsisting at the time of the loss. Where there has been an absolute transfer of the property insured, leaving no interest in the assured, there is nothing for the insurance to operate upon in case of loss, as there can be no injury to the assured resulting therefrom. *Carroll* v. *Boston Marine Ins. Co.* 8 Mass. 515. *Gordon* v. *Massachusetts Mutual Fire & Marine Ins. Co.* 2 Pick. 258. *Wilson* v. *Hill*, 3 Met. 68. *Macomber* v. *Cambridge Mutual Fire Ins. Co.* 8 Cush. 133.

It appearing from the facts stated in the case that Pollitz and Codman had before the loss conveyed all their interest in the subject of the insurance to the plaintiff, it is quite obvious that they ceased to have any interest in themselves, that was covered by this policy, for their personal benefit, and no recovery can be had on their behalf.

The further inquiry is, whether the plaintiff has any claim in his own right? As a mere purchaser of the property insured, he acquired in his own right no interest in the policy that had previously existed in favor of his vendors. The claim is of a different character. It is that he holds an assignment of the policy made to his vendor, and is by force thereof a party to the same. The question is not as to the right of the plaintiff to sue in his own name on this policy, for a loss accruing to the property of Pollitz and Codman, if such loss had occurred while they were interested in the same, but whether the newly acquired interest of the plaintiff was insured by force of the acts of these parties.

The policy bears the following indorsement, made June 10th 1850: "Pay under the within policy to Edward Minturn or order. O. W. Pollitz." But this indorsement was a mere order to pay to Minturn any loss that might happen to Pollitz and Codman. It was not an assignment by virtue of which any new party to the insurance was introduced. *Fogg* v. *Middlesex Mutual Fire Ins. Co.* 10 Cush. 337. *Loring* v. *Manufacturers' Ins. Co.* 8 Gray, 29, 30. These cases are very full to the point that such an order transfers nothing more than what may be recovered for a loss on the interest of the party originally insured.

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But it is said that the fact of the sale of the interest to Minturn being shown by other evidence, and that it was accompanied by an assignment of the policy to the purchaser, and thus made known orally to the insurers, and by them assented to, it establishes a new and original promise to the assignee to indemnify him against his loss, if any occurs. This doctrine has much to sustain it in the elementary books and reported cases, and was assumed by the court as correct in the case of *Wilson* v. *Hill*, 3 Met. 68.

Without questioning this as applicable to those policies where there is no restrictive clause regulating assignments of policies, and the vesting of new interests in third parties, the present case might be decided upon the stipulations of this particular policy, strict, it may be, but such as the parties have entered into. This policy has on its face, and as a part of the contract, "It is agreed that this policy shall be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers." There is no assent in writing by the insurers to the transfer that was made of the interest of Pollitz and Codman, and the assignment of this policy to Minturn, to secure the new interest thus acquired by his purchase. The only direct assent in writing by the defendants is to the order of Jones & Johnson to "pay under the within policy to O. W. Pollitz or order." The only assent in writing to the order of Pollitz "to pay the within to Edward Minturn," is such as may result from the written acknowledgment of the defendants' having received subsequently an additional premium for delay in getting the vessel to sea, and waiving all objections on account of such delay.

But as regards the evidence of written assent, the objection is the broader one that it is only an assent to the order to pay the loss under the policy upon the interest of Pollitz and Codman. As such it might have been good and sufficient, but it was no written assent to the assignment of the policy to Minturn, as the owner of the goods and interest assured, nor stipulation to make good to him his loss on his property thus purchased.

In the opinion of the court the defence taken upon this point

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must prevail. The parties have stipulated that the written assent of the insurance company to any assignment or transfer of the policy must be previously given. The rights of the plaintiff to recover must necessarily, after the sale by Pollitz and Codman of all their interest, rest wholly upon the ground of his being a purchaser, with an assignment of the policy. As an assignee claiming under a new interest thus acquired, he should have procured the previous consent of the defendants in writing thereto.

The oral evidence was properly excluded, as by the stipulations of the policy the assent to the assignment was required to be in writing. *Judgment for the defendants.*

ABIEL S. LEWIS & another *vs.* THE EAGLE INSURANCE COMPANY.

The testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory at times fails him in consequence of mental injury resulting from a sunstroke, and that such is his present condition, is not to be stricken out by the presiding judge, but may be submitted to the jury.

In an action on a policy of insurance for a constructive total loss, if the plaintiff in his claim of loss has given the insurers credit for a certain amount received for salvage, he is not bound to prove that he did not receive more.

A person sent to a foreign port to take charge of a vessel in distress, who ascertains by inquiry the prices of labor and materials necessary to repair vessels there, but has no other knowledge thereof, is not a competent witness on that subject.

In an action on a policy of insurance, under an answer alleging a false and fraudulent representation by the assured of the value of the vessel insured, the defendants may prove a false, though not fraudulent, representation.

ACTION OF CONTRACT upon a policy of insurance on the Schooner Emeline, valued therein at $6000. Trial at March term 1854 before *Bigelow*, J., who made the following report thereof:

"It appeared that the Emeline, while on a voyage during the year, put into Nassau, N. P., in a leaky condition, where the master called two different surveys upon her. The first survey

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recommended that she should be repaired, and estimated the cost of the needful repairs at $600. The second survey estimated said repairs at $6000, and condemned her, and she was sold by the master at auction at said Nassau.

"The plaintiffs, for the purpose of proving the nature and extent of the injuries which they alleged the vessel had sustained, and the cost of the repairs which they alleged she required, called Elisha W. Gunnison, who testified that he was on the first survey, but had refused to sign the report with the other surveyors. He was examined at great length by the plaintiffs as to the condition of the vessel on her arrival at Nassau, the various injuries which she had sustained, the repairs required, and the cost of each in detail at the said time at Nassau; and was the only witness produced by the plaintiffs as to the exact cost of the repairs which they alleged the vessel required.

"After the defendants had commenced their cross-examination of this witness on the subjects above stated, he declared himself unable to answer their questions, and that he had totally forgotten all that he had said on direct examination on this subject; and stated that he had formerly received a sunstroke, which had impaired his memory, so that at times it was entirely lost, and that he was now in that condition; but he stated that he was not so affected during his direct examination by the plaintiffs, though he could not now tell what he had said.

"Upon this evidence the defendants claimed that if this statement was true, the testimony of Gunnison should not be considered by the jury or submitted to them at all, and should be stricken out of the case. But the presiding judge refused to strike it out or to withdraw it from the jury, and ruled that the whole testimony of Gunnison was competent for the consideration of the jury; and it was submitted to the jury in connection with the other evidence in the cause.

"The plaintiffs, in their claim for loss, gave credit to the defendants for a certain amount, which they alleged they received from the proceeds of the said auction sale of said vessel; but offered no evidence as to the actual amount so received. Whereupon the defendants contended that the plaintiffs were bound

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to satisfy the jury by proof as to the amount so actually received by them, before they could recover the amount of loss which they claimed.

"But the judge ruled that it was not necessary for the plaintiffs to prove the amount so received by them; and that if there was no evidence in the case bearing on this point, it would be the duty of the jury, if they found for the plaintiffs, to deduct the amount of the credit given by the plaintiffs from the amount which they should find to have been lost by the perils insured against; the burden of proof being on the plaintiffs to prove the amount of the loss.

"The defendants, in order to prove the cost of labor and materials for repairs at said Nassau, called Ebenezer Davis, a shipmaster, who testified that he was sent there to take charge of a vessel which was then in distress; that he then ascertained, by inquiries of shipwrights, material-men and others, what were the prices of certain materials used in repairs and the cost of labor upon vessels; that he had no knowledge of these prices, except what he derived from the statements of others, not having bought or paid for any supplies or repairs in Nassau.

"But upon the plaintiffs' objecting, the presiding judge refused to permit the witness to testify what upon such inquiry he ascertained such cost and prices to be; there being evidence in the case on both sides, from witnesses having actual knowledge of the cost and expense of materials, labor and repairs at Nassau.

"The jury returned a verdict for the plaintiffs for a total loss. If the foregoing rulings, or any of them, are incorrect, the defendants are to be entitled to a new trial."

The defendants also moved for a new trial, on the ground that the verdict was against evidence; and all the testimony was reported for the purpose of determining that question. The arguments and decisions upon these reports were made at November term 1856.

C. G. Loring & E. D. Sohier, for the defendants, to the point that Gunnison's evidence should have been stricken out, cited 2 Phil. Ev. (6th Amer. ed.) 91, & note; *Kissam* v. *Forrest*, 25 Wend. 651; *Gass* v. *Stinson*, 3 Sumner, 98; *Cazenove* v.

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Vaughan, 1 M. & S. 6; and that the testimony of Davis should have been admitted, *Lush* v. *Druse*, 4 Wend. 313.

R. Choate & I. W. Richardson, for the plaintiffs, to the first point, cited 1 Greenl. Ev. § 365; *Evans* v. *Hettich*, 7 Wheat. 473; *Depeyster* v. *Columbian Ins. Co.* 2 Caines, 85; *Clements* v. *Benjamin*, 12 Johns. 299; *Cazenove* v. *Vaughan*, 1 M. & S. 4.

By the Court. The questions of law seem to have been rightly decided by the judge who presided at the trial.

1. The evidence of Gunnison was competent, though subject to great doubt as to its credibility. All the testimony that the witness could give was before the court. It is not like a case where the testimony of the witness is left incomplete, as where a witness dies before his examination is finished, as in *Kissam* v. *Forrest*, 25 Wend. 651, and 7 Hill, 463.

2. The plaintiffs had charge of the vessel, sold what was sold, and were bound to render an account. In the account which they rendered, they gave credit for the salvage. If the defendants were not satisfied, they could interrogate the plaintiffs and demand their accounts, and have an account taken before an auditor. But if they went to trial, it was incumbent on the defendants to show that more salvage had been earned by the plaintiffs than they had accounted for.

3. The evidence of Davis as to what he had heard was properly rejected, as mere hearsay, not verified by oath, nor coming from one who knew the prices at or about the same time by actual dealings.

But upon an examination of all the evidence given at the trial, we are of opinion that there was no competent and sufficient evidence to prove a constructive total loss, so as to warrant an abandonment, and that the verdict therefore, being against evidence, must be set aside, and a *New trial granted.*

A second trial was had at November term 1857, before *Thomas*, J., who, after a verdict for the plaintiffs, made a report to the full court, so much of which as is material to the understanding of their decision was as follows:

The defendants in their answer alleged that "the said vessel

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was valued by the plaintiffs to them at the time when said policy was made, and represented by the plaintiffs to the defendants to be of the value of six thousand dollars, and upon the faith of such valuing and representations the defendants executed the said policy wherein said vessel is valued at six thousand dollars; and the defendants say that the same was a gross and fraudulent overvaluation of said vessel by the said plaintiffs;" and further alleged that "they were induced to make the policy declared upon by the fraudulent representations of the plaintiff W. G. Lewis, who represented to the defendants, in order to obtain said insurance of six thousand dollars, that he had paid five thousand dollars for the said vessel, or she cost five thousand dollars, and that he had laid out one thousand dollars on her, whereas the said vessel was bought by him for two thousand one hundred and fifty dollars."

The defendants offered evidence tending to prove the allegations in the answer. And the presiding judge instructed the jury as follows:

"If, upon the evidence, the jury find an overvaluation, fraudulently made on the part of the assured or his agent, with the intent of destroying the property, and of recovering from the insurers the amount for which it is so valued, such a fraudulent purpose would render the contract void.

"The law requires of the parties to a policy of insurance the exercise of good faith. A misrepresentation is a false representation of a material fact by one of the parties, tending directly to induce the other to enter into the contract. This principle, applicable to all contracts, is peculiarly applicable to a policy of insurance, which is ordinarily made upon the statements and representations of the assured. A representation of what a vessel cost, or what was paid for it, is a representation as to a material fact; and if the plaintiffs, in effecting this policy, fraudulently, and in order to obtain the insurance, represented that the vessel cost $5000 and $1000 for coppering, when, in point of fact, the entire cost was $3150, it was a misrepresentation upon a material point, which, if false, would avoid the policy.

"But this question is to be tried upon the exact answer filed

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by the defendants; and that answer, as made, requires proof that the representation was fraudulent, as well as false, and, in point of fact, induced the defendants to make the contract; that the defendants had taken this burden on themselves; and that the burden in this matter was on the defendants."

Sohier & C. W. Loring, for the defendants.

Choate & Richardson, for the plaintiffs.

Merrick, J. The representation made by the plaintiffs, upon obtaining insurance upon their vessel, that it cost them five thousand dollars and one thousand more for coppering, was of and concerning facts material to be known by the underwriters; and, if false, avoided the policy which they had issued, and relieved them from all liability thereon. Upon this point the instructions given to the jury were correct. But the instructions went further than this; and it was ruled that, upon the exact answer filed by the defendants, they must prove, in order to avoid the policy, not only that the representation made by the plaintiffs was false, but that it was also fraudulent. This, we think, would necessarily have been understood by the jury as importing that the alleged fraud was a distinct subject of inquiry, not to be deduced from the mere proof of the false representation relative to the cost of the vessel; and that unless this fraud was established by other evidence, they would not be warranted in finding a verdict for the defendants. There is nothing in their answer, which imposes upon the defendants the burden of proving this fact, in addition to the fact of a false representation, in order to maintain their defence. It is true that they allege in general terms that the representation of which they complain was falsely and fraudulently made. But whether this representation was designedly and intentionally erroneous, and made with the corrupt purpose of gaining an undue advantage or not, is immaterial in relation to the question at issue between the parties; for if it was false, it clearly exonerated the defendants from the performance of the contract on their part, and wholly avoided the policy. It is unnecessary to multiply citations in support of this position, because, as is remarked by Mr. Phillips in his treatise on insurance, the doctrine is con

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stantly assumed, and runs through the whole jurisprudence on the subject, that material representations having reference to past or existing circumstances discharge the underwriters from all liability in respect of the risks to which they relate. 1 Phil. Ins. §§ 537, 677. *Elton* v. *Larkins*, 5 Car. & P. 385. The ruling of the court therefore, which required the defendants to produce proof of the fraudulent character, as well as of the falsity, of the plaintiffs' representations concerning the cost of their vessel, in order to sustain their defence, must be held to have been erroneous; and for this cause only, as the instructions which were given to the jury appear in all other particulars to have been unexceptionable, the verdict for the plaintiffs must be set aside, and a

New trial granted.

A third trial was had at November term 1858 and resulted in a verdict for the plaintiffs for a partial loss.

JAMES LEEDS, Executor, *vs.* CYRUS WAKEFIELD & others.

The execution of a power, affected by a trust for the benefit of children and their issue, to which the consent of a majority of the children living at the time of executing it is made necessary by the will creating the power, is valid in equity without such consent, if the children are all dead at that time.

A testator, who left a wife, three sons and a daughter, devised the rents and profits of real estate to his wife during her life, and, in case she should die before all his children should be of age, directed his executor to take possession of the estate and, as long as any of the children should be under age, appropriate the income to their support, "and as soon as all my said children shall have come of age (their mother being dead) my said executor shall proceed to sell and dispose of my said estates, consulting and advising however with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sale," and distribute the proceeds among the four children equally, giving the share of any child who should be dead to its lawful issue, or, if there should be no such issue, to the surviving children, equally; and further, if the wife should not die till all the children should be of age, take possession of the estate and proceed to sell it "in the same way and under the same limitations, and distribute the proceeds thereof in the same manner as is above provided in the case of my wife's dying before all my children shall have come of age."

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All the children came of age and died in the wife's lifetime; all without issue, except one son, who left a child; the daughter conveyed her interest before her death; at the widow's death, the executor sold the real estate. *Held*, that the daughter's interest was either contingent, or, if vested, was devested by the execution of the power, and in either case her grantee had no interest in the proceeds of the sale.

BILL IN EQUITY, in the nature of a bill of interpleader, filed by the executor and trustee under the will of John Howe, the material provisions of which were as follows:

1st. A devise of the rents and profits of certain real estate to his wife for life, charged with the maintenance of his three sons during minority, and of his daughter while unmarried.

2d. "If my said wife should die before all my children shall have arrived at lawful age, then it is my will that my executor shall take possession of my real estates, and receive the rents and income thereof as long as any of my children shall remain under age, and shall appropriate the said income, or so much thereof as may be needed for that purpose, to the support and maintenance of such minor child or children, and when all my said children shall be of age, if there remains any balance unexpended of said rents and profits in my executor's hands, he shall distribute it equally among my said children; and as soon as all my said children shall have come of age (their mother being dead) my said executor shall proceed, as soon as he conveniently can, to sell and dispose of my said estates for the best price he can obtain, consulting and advising however with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sale;" and the proceeds of the sale, together with any unexpended income, shall be distributed equally among the four children, giving the share of any child, who shall be dead, to its lawful issue, or, if there shall be no such issue, to the surviving children equally.

3d. "If my wife shall not decease until after all my children shall have come of age, then it is my will that immediately upon the decease of my wife my said executor shall enter into and take possession of my said estates, and shall proceed to sell and dispose of the same in the same way, and under the same limitations, and shall distribute the proceeds thereof in the same

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manner, as is above provided in the case of my wife's dying before all my children shall have come of age."

The testator's widow and four children all survived his death and the coming of age of the youngest child. Then two of the sons died, without issue. The daughter, Ann Howe, conveyed her interest in the estate to Cyrus Wakefield, in trust, first, for herself and children, and then for Enoch H. Wakefield, whom she soon after married; and died without issue. The surviving son, George, died, leaving issue a minor daughter, Ann M. Howe. And then the widow died. The executor sold the estate, under a resolve of the legislature, and an agreement that the sale should not affect the rights of the parties; and held the proceeds for distribution.

The granddaughter, as the sole heir of the only one of the testator's children who left issue, claimed by her guardian the whole of the proceeds. The Wakefields claimed a portion under the conveyance from the testator's daughter.

A. A. Ranney & N. Morse, for the plaintiff and the granddaughter.

E. R. Hoar & H. Gray, Jr. for the Wakefields. The estate vested in all the testator's heirs equally, except so far as the will otherwise provided. The devise to the widow for life did not affect the estates of the heirs upon her decease.

The second provision of the will, whether it would give the executor a mere power, or an estate by implication, was to take effect only upon the contingency, which never happened, of the death of the widow before all the children should come of age.

The third provision of the will, being a mere direction to the executor to sell and to distribute the proceeds, gave him a power merely, and no estate; and left the estate in the heirs, subject only to be devested upon a lawful execution of the power. *Greenough* v. *Welles*, 10 Cush. 577. 4 Kent Com. (6th ed.) 320, & authorities cited. Where, by the terms of an instrument creating a power, the consent of particular persons, either named or described, is required, their consent must be obtained; and after their death the power cannot be executed. Sugd. Pow. (1st Amer. ed.) 211, 212, 264. Pow. Dev. 296. 2 Prest. Abstr.

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Tit. 263. *Danne* v. *Annas*, Dyer, 219 *a*. *Butler* v. *Bray*, Benl. 82; Dyer, 189 *b*; approved in Godb. 77, 1 Leon. 74, and Wilmot, 56. *Atwaters* v. *Birt*, Cro. Eliz. 856. *Mansell* v. *Mansell*, Wilmot, 53–56. The words of a power are to receive a reasonable construction; but, so construed, must be strictly complied with. It is in accordance with this rule, that a power, given to three or more generally, and not by name — as to "my trustees," "my sons in law" — has been held to survive while the plural number remains. Sugd. Pow. 165, approved by Wilde, J. in *Tainter* v. *Clark*, 13 Met. 225, 226.

The clause in this will, requiring the executor to advise with the children before selling, would of itself prevent him from executing the power after their death. *Frankelen's case*, cited by Dyer in Mo. pl. 172. But he is also in terms prohibited from selling "unless the consent of a majority of my said children then living shall be obtained in writing to the said sale." These words cannot fairly be taken to limit the previous clause further than to make the assent of a majority equivalent to unanimous assent; indeed the very word "majority" implies the existence of somebody, if not of more than one. The court cannot, after "children then living," add "if any shall be then living." The testator's intent appears to have been that a sale of the estate, which might under his will occasion a change in the division of his property, should not be made without the consent of some of his own children.

Shaw, C. J. The power given to the executor to sell and dispose of the real estate, upon the decease of the widow, after the children had all come of age, and to distribute the proceeds of the sale amongst the children then surviving, putting the issue of any deceased child in place of such child for the purpose of distribution, was a power coupled with a trust, which trus could only be carried into effect by first executing the power, so that the trust affects the proceeds, when thus raised by the execution of the power, by the sale of the estate. *Greenough* v *Welles*, 10 Cush. 576.

As a general rule, one clothed with a mere naked power may execute the power or not, at his own will; but one invested

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with a power to which a trust is annexed is bound in equity, as in other cases of trust, to execute the power, in order that the equitable rights of those who are stated as the objects of the testator's bounty under such trusts, may have the enjoyment of the benefits intended for them. Sugd. Pow. 394. And so far will a court of equity regard the rights of such objects of the testator's bounty, that, when the donee of the power has from any cause failed to execute it, and thereby give direct effect to the trust, in regard to the proceeds of the sale, a court of equity will require the party in whom the estate is vested to join in a sale of the estate, in order to give effect to the trusts dependent thereon. *Gibbs* v. *Marsh*, 2 Met. 251. And when a power is thus coupled with a trust, it is the duty of the donee to execute it as required by the will; and a court of equity will not permit any accident, neglect of the donee, or other cause, to disappoint the interest of those who are entitled to the contemplated benefits under it.

But it is not necessary to inquire what would have been the rights of the beneficiaries in case the original donee of the power, the executor, had elected not to execute it, or had neglected to do so, or had died before executing it; because the executor as such donee of the power has survived the widow and all the children, and is not only ready and willing to execute the power but has executed it, by selling the estate, and he now holds the proceeds subject to the trusts of the will, and brings this bill, in the nature of a bill of interpleader, that the conflicting claimants of these proceeds may contest their relative claims and obtain a decree of this court directing him how to pay it over.

The foregoing considerations as to what would have been the rights of the parties, in case the power had not been executed, are important only as illustrating the nature and extent of the rights of the beneficiaries under such trust power, and the manner in which they are regarded in a court of equity, as extending to and affecting the real estate, out of the sale of which, under the power, such equitable rights arise.

The only ground on which any doubt would seem to arise in this case is, that the power of sale was made conditional on the

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consent in writing by the children. The purpose of the testator, we think, was to make a disposition of his whole estate; and the mode was by ordering his executor to sell, as soon as all the children should come of age and the widow decease; should she die before the youngest child was of age, the sale might then be postponed till the latter contingency should happen; it was then to be made. There might therefore be a case in which the sale should be made, when all or some of the children should be living and of age, and then it was the intent of the testator that such consent should be obtained. But if, on the decease of the widow, there were no children surviving, no children then living, there was no apparent purpose which could have affected the mind of the testator, to prohibit a sale, when such consent of children had become alike unnecessary to protect their interests, and impossible; we think the condition was annulled by the event of all the children dying, and therefore that the power became thereby unconditional.

Whether this would be the case with respect to a mere naked power, the right execution of which depends upon a strict compliance with all the terms on which it is given, or not, we have no doubt that it applies to a trust power, where the execution of the power is obviously a means only of carrying into effect the ultimate object of the testator, in providing for the benefits specially designated for the declared objects of his bounty.

A subsequent clause of the will directs that if the wife shall not decease until all the children have come of age, then it shall be the duty of the executor, immediately on the decease of the wife, to enter upon and sell the estates, and to proceed in the same way and under the same limitations, and to distribute the proceeds in the same manner. This, we think, applies to the actual state of things as it should exist; if children then survived, they were to be consulted, and their consent in writing obtained; otherwise, being impossible, the sale was to be made without such consent.

How then does the execution of the power affect the interest of the respondents Wakefield and Wakefield, either in the real estate, or in the proceeds thereof in the hands of the executor?

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Had there been a residuary clause in this will, the legal estate, after the devise to the wife for life, would have vested in such residuary devisee in fee; but such legal estate would have so vested in him, 1. even if the power of sale were a naked power, subject to be devested upon a due and legal execution of the power of sale, by which it should be sold to a third party, to hold in fee; and 2. if it was a trust power, then subject to the trust thereby created, which would reach and affect the estate, even if there had not been a precise and exact legal execution of the power by a completion of such execution in equity.

But in the present case there was a strict execution of the power, by the original donee, by which, had the legal estate vested in a residuary devisee, it was devested and wholly defeated. It is unnecessary to discuss the question whether Ann Howe, when she executed her deed to Wakefield, had a vested or contingent interest in the estate; if contingent, it was dependent on the event of her surviving her mother, whom she did not survive, and so it never became vested; but, if vested, it became devested by the due execution of a power of sale created by the same will under which she derived her legal estate. *Cowdin* v. *Perry*, 11 Pick. 509. As there was no residuary clause in this will, or other devise over, after the decease of the wife, the children took the legal estate as heirs at law; but their legal interest would be regarded as a reversion, subject to be defeated by the right execution of a power given by the ancestor by his will, and subject to any trust affecting the estate in equity, in the same manner as if they held by way of remainder.

We are therefore of opinion, that whatever legal estate Ann Howe had in the remainder or reversion expectant on the termination of the life estate of the mother, it was either a contingent interest, and was determined by her decease in the lifetime of her mother; or, if vested, it was defeated by the due execution of the power of sale by the executor; and, in either event, her grantee has no interest in the proceeds of the sale of the estate by the executor; but Ann M. Howe, the minor, being the only child and heir of George Howe, who was the only child of the testator who left issue, is entitled by the terms of his will to the net proceeds of such sale. *Decree accordingly.*

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Seth Adams vs. Boston Wharf Company.

General rules for the division of flats among coterminous proprietors of land bounding on the seashore must yield to lines established by a partition affirmed by the court, and acquiesced in by the parties for thirty five years.

Commissioners of partition of land bounded southwesterly on Second Street, northwesterly on B Street, and northeasterly "by the sea," made a return, of which a plan was made part whereon B Street was extended upon the flats at right angles with Second Street: and set off to P. a lot, beginning at the corner of said streets, and bounded southwesterly on Second Street for a certain distance, "then turning at right angles and bounding on land hereinafter assigned to M., and running northeasterly to low water mark, then running northwesterly as the channel runs to B Street, then by B Street as that runs to the corner begun at:" They set off to M. the next lot to the east of this, bounded southwesterly by Second Street a certain distance, "then turning at right angles and running northeasterly to low water mark, then turning again and running by the channel to land and flats hereinbefore set off to P., then turning again and running southwesterly along said land of P. to Second Street:" They left "undivided and unassigned" to G., the respondent in partition, the next lot eastwardly: And their return was accepted by the court, and acquiesced in by the parties for thirty five years. *Held*, that G. had no title in flats westerly of B Street, although independently of the partition they would have come within the lines, as established by the court, of the estate thus divided; or that if he had, no title in flats westerly of B Street was conveyed by a subsequent deed from him, of "a certain piece or parcel of land and flats," bounded southerly on Second Street, beginning at the land of M., and running easterly on said Second Street a certain distance, "then turning at a right angle and running northerly on other land of G. as far as his land extends, then beginning again at the first mentioned point and running northerly on land of M. and parallel to B Street as far as the land of G. extends; it being the intention of this instrument to convey" a certain amount "of upland, together with all the flats to said land belonging, running out as far as G. has a right to go, but without warranty as to the courses of the side lines over said flats; but meaning hereby to sell and convey said upland as above described, together with all the flats to said G belonging, situated on the westerly side of a line beginning at the southeasterly corner of the granted land on Second Street, and running northerly at right angles with Second Street."

Writ of entry to recover a parcel of flats on the cove on the northerly shore of South Boston. Plea, nul disseisin. Trial before the chief justice, who directed a nonsuit, subject to the opinion of the whole court upon the following case:

The demandant contended that these flats were appurtenant to a tract of upland of about fifteen acres, southeast of B Street, formerly belonging to Jonathan Bird, but which in 1809 was owned in common by Thomas H. Perkins, Jonathan Mason, Harriet J. Gardner, (afterwards Mrs. Denny,) and others; and

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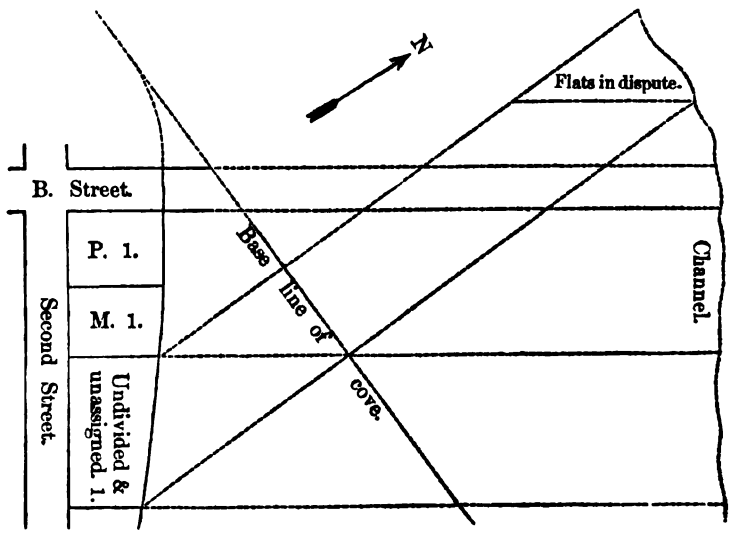
gave in evidence a petition to this court in that year of all said tenants in common except Harriet J. Gardner, for a partition of this tract of land; a warrant issued thereupon to commissioners to make partition thereof, and their return of the "partition of said piece or parcel of land, described as bounded "by the sea on the northeast; in the manner following, which is faithfully and impartially done, according to our best skill and judgment, always referring to the annexed plan of the same land, taken by Mather Withington, surveyor, and dated Dorchester, January tenth A. D. 1810, which plan is to be considered as part of this return." The following plan (except the dotted lines, which indicate the division lines contended for by each party,) is taken from said plan of Withington.



The return of the commissioners was accepted by this court at March term 1810, and so much of it as is material to the understanding of this case is as follows:

"The first piece of land so set off and assigned unto said Perkins is marked P. 1 on said plan, and is bounded and measures as follows, viz: Beginning at the northeasterly corner of Second Street and B Street, and is bounded southwesterly on Second Street, running eighty two feet and one half from said corner;

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then at the distance of eighty two feet six inches from said corner turning at right angles, and bounding on land hereinafter set forth and assigned unto Jonathan Mason, Esquire, and runs northeasterly from said Second Street to low water mark; then runs northwesterly as the channel runs to the said B Street; then is bounded by said B Street, as that runs up to the aforesaid corner begun at."

"The first piece of land so assigned and set off to said Jonathan Mason is marked M. 1 on said plan, and is bounded and measures as follows: southwesterly by Second Street, measuring thereon eighty two feet six inches from a point thereon, which is eighty two feet and a half from the corner of B Street; then at the distance of one hundred and sixty five feet from the corner of B Street, turning at right angles and running northeasterly to low water mark; then turning again and running by the margin of the channel northwesterly to land and flats hereinbefore set off to Thomas Perkins, marked P. 1 on said plan; then turns again and runs southwesterly along said land of said Perkins to Second Street aforesaid, striking the same at said point eighty two and a half feet from said corner of B Street."

To each of the other petitioners for partition was assigned a "piece of land," "bounded southwesterly by Third Street" a certain distance, "and preserving the same width, runs from said Third Street to low water mark, both sides of Second Street and First Street, excepting thereout the land covered by said Second Street and First Street, northeasterly by the channel." The most northwesterly of these lots was assigned to Helena Augusta Gardner, and described as bounded "northwesterly by land undivided and unassigned;" and the most southeasterly, which was assigned to Moses Everett, was described as bounded "southeasterly by C. Street."

"Having thus set off, assigned and divided, unto each of the petitioners named in said petition respectively, a portion of the said land described in said petition, equivalent to the particular and respective undivided proportion and part belonging to each petitioner, as set forth in the said petition, we have left, undivided and unassigned, ten thirtieth parts thereof, owned as fol-

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lows, and as stated in said petition, to wit: the said Moses Everett is tenant thereof by curtesy, and the remainder in fee is in Joanna Harriet Gardner; and the land thus left undivided is in four lots, marked on said plan, undivided and unassigned, 1, 2, 3, 4."

The lots thus set off to Perkins and Mason afterwards came by successive conveyances to Thomas Cains.

The demandant also gave in evidence a deed, dated March 1st 1845, with the usual covenants of seisin and warranty and against incumbrances, to himself from Daniel Denny and his wife Harriet J. G. Denny, (who is the Joanna Harriet Gardner mentioned in the above return,) in her right, of "a certain piece or parcel of land and flats, situated in that part of said Boston called South Boston, and bounded and described as follows, to wit: Bounded southerly on Second Street, beginning at a point on said Second Street, at the distance of one hundred and sixty five feet easterly from B Street, at the line of land of Thomas Cains; thence running easterly on said Second Street one hundred and sixty five feet; then turning at a right angle and running northerly on other land of said Harriet J. G. Denny as far as her land extends; then beginning again at the first mentioned point, and running northerly on land of said Cains and parallel to B Street as far as the land of said Harriet J. G. Denny extends; it being the intention of this instrument to convey to said Adams about eleven thousand six hundred and twenty two square feet of upland, as marked and laid down on a plan which is recorded with Suffolk deeds, at the end of Book 232, together with all the flats to said land belonging, running out as far as the said Harriet J. G. Denny has a right to go, but without warranty as to the courses of the side lines over said flats; but meaning hereby to sell and convey said upland as above described, together with all the flats to said Harriet J. G. Denny belonging, situated on the westerly side of a line beginning at a point on Second Street three hundred and thirty feet easterly from B. Street, and running northerly at right angles with Second Street."

"It was agreed that the lot of upland aforesaid is bounded on

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the same cove in which are the flats, the subject of controversy in the suit of *Gray* v. *Deluce*, 5 Cush. 9; that the tide in this cove ebbs more than one hundred rods; and that the easterly side line of the flats appurtenant to the aforesaid lot of upland divided by said partition, extended according to the rule applied by the court in the decision of that case, would intersect B Street, mentioned in the aforesaid return of said commissioners, at a point less than one hundred rods distant from high water mark. The parcel of flats demanded is on the westerly side of said B Street, and is part of the flats appurtenant to the lot of upland aforesaid, providing the westerly side line thereof be extended agreeably to the rule applied as aforesaid in the case of *Gray* v. *Deluce*."

This case was argued at November term 1857.

H. W. Paine & C. W. Loring, for the demandant. The demandant's upland is part of that "left undivided and unassigned" to his grantor in the partition of the Bird estate. The boundary of that estate "by the sea on the northeast" included all the flats by law appurtenant to it. *Jackson* v. *Boston & Worcester Railroad*, 1 Cush. 578. *Saltonstall* v. *Long Wharf*, 7 Cush. 200. The rule established by this court for the division of flats in this cove is to draw straight lines from the two shore corners of the upland, perpendicularly to a base line extended across the cove. *Gray* v. *Deluce*, 5 Cush. 9. And it is admitted that by that rule the flats demanded would belong to the demandant's upland.

The warrant to the commissioners to make partition required them to divide the whole estate, the flats as well as the upland. St. 1783, *c.* 41. *Partridge* v. *Luce*, 36 Maine, 16. Their return shows that they intended to divide the whole estate; to assign to each proprietor of the shore a parcel of flats in proportion to his upland and of uniform width throughout; and to give to each access to the sea. All these purposes can be effected by so deflecting the side lines of the shore lots, at the line of high water, that they shall be perpendicular to a base line drawn across the cove from headland to headland; and they can be effected in no other way.

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The courses indicated and the boundary on B Street, being repugnant to the general intent, to the legal title in the flats, and to the monuments of "low water mark," and "the channel," must be rejected. *Curtis* v. *Francis*, 9 Cush. 427. *Thatcher* v. *Howland*, 2 Met. 41. *Foss* v. *Crisp*, 20 Pick. 121. *Bosworth* v. *Sturtevant*, 2 Cush. 392. *Keith* v. *Reynolds*, 3 Greenl. 393. *Witham* v. *Cutts*, 4 Greenl. 31. *Bucknam* v. *Bucknam*, 3 Fairf. 463. *Pike* v. *Moore*, 36 Maine, 309. *White* v. *Gay*, 9 N. H. 126. *Gates* v. *Lewis*, 7 Verm. 511. *M'Ivers* v. *Walker*, 9 Cranch, 173. *Jackson* v. *Carey*, 2 Johns. Cas. 350. *Colclough* v. *Richardson*, 1 McCord, 167.

If the divisional lines cannot be deflected, all the flats appurtenant to the Bird estate and lying west of B Street, not being assigned to either of the petitioners, vested in severalty in the demandant's grantor as the sole respondent in partition; or, if limited in this respect by the specific enumeration of the parcels designed for her, she remained tenant in common of one third; and whatever her interest was, it passed by her subsequent deed to the demandant, and may be recovered in this action. *Foss* v. *Crisp*, 20 Pick. 121. *Marr* v. *Hobson*, 22 Maine, 321.

That deed, after describing the granted premises as both "land and flats" in South Boston; giving the metes and bounds of the upland only, and declaring the grantor's intention to convey "all the flats to said land belonging;" and excluding any warranty as to the courses of the side lines over said flats; further declares an intention to convey "all the flats to said Harriet," not merely to said land, "belonging, situated on the westerly side of a line" clearly defined. This last description is sufficiently definite to pass all the flats owned by the grantor in South Boston, west of the specified line. *Ward* v. *Bartholomew*, 6 Pick. 409. And it is difficult to imagine any other reason for adding this clause, than that the grantor was in doubt where her flats in that cove were, but intended to convey them, wherever they were, if west of that line.

H. F. Durant & A. C. Washburn, for the tenants.

Merrick, J. The demanded premises consist of a parcel of flats lying westerly of B Street in South Boston. Two ques-

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tions arise upon the facts reported by the judge who presided at the trial: first, whether the demanded premises, at the time of the conveyance from Mr. and Mrs. Denny, belonged to her; and, secondly, if they did, whether they were included in the description in that deed and passed by it to the demandant.

It appears from the report and the plan accompanying it, that the upland conveyed by said deed to the demandant was a part of a parcel of land known as the Bird lot; and that the Bird lot was a small part of the tract of land or territory which was formerly included within the limits of the town of Dorchester, and which by the statute passed March 6th 1804 was annexed to the then town of Boston. *St.* 1803, *c.* 111. The Bird lot was then owned by said Harriet and others as tenants in common, and the whole of it, together with other land lying both to the east and west of it and owned by other persons, was bounded upon the cove which is mentioned and described in the case of *Gray* v. *Deluce*, as reported in 5 Cush. 9. All those owners were entitled under the ordinance of 1647 to their proportions respectively of the flats adjoining the upland which belonged to them. *Commonwealth* v. *Alger*, 7 Cush. 67. And it is admitted by the tenants that upon a division of the flats within the cove, according to the rule established by the decision in the above named case of *Gray* v. *Deluce*, the demanded premises would be appurtenant to the tract of upland conveyed to the demandant, and would therefore in such case belong to him. It is upon the application and enforcement of this rule that he insists that his action to recover possession of it may be maintained.

But it is obvious that the only effect of the ordinance of 1647 is to transfer the title to the flats from the State to the owner of the adjoining upland. The land of which they consist is real estate, and of course subject to all the laws by which that species of property is held, controlled and regulated. It may be improved, sold, divided, and conveyed in separate and distinct parcels, like any other land, at the pleasure of the owner; and consequently the several owners of upland bounded on the sea have the right and power, by proper legal instruments and conveyances, to establish such lines of division between their

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respective portions of the flats as they may find to be for their mutual advantage. The tenants contend that, in the exercise of this right, the proprietors of the upland bordering upon the part of the cove in question did, long before the conveyance to the demandant, make a division of the flats to which they were severally entitled, and established the boundaries of their respective shares, so that their title thereto was no longer to be ascertained by applying the rule laid down in the case of *Gray* v. *Deluce*. They produce no deeds of such partition; but they rely upon proof of facts and circumstances from which they insist that such deeds, or grants to such effect, must be presumed to have been duly made and executed.

By the *St.* of 1803, *c.* 111, a large territory, consisting in part of lands belonging to many different owners, and bordering upon the sea, was annexed to the town of Boston; and the selectmen were authorized to lay out such streets and lanes through the whole of said territory, as in their judgment would be for the common benefit of the town and of the proprietors of the land. In the discharge of this duty, they were enjoined to pay reasonable attention to the wishes of the proprietors; but no compensation was to be made to the owners for lands taken for such purposes, nor were the streets to be completed sooner than the officers of the town should deem it expedient to do so. In pursuance of the authority thus conferred upon them, the selectmen did on the 27th of February in the ensuing year, having first conferred with the proprietors on the subject, lay out streets over all parts of the common territory, according to a plan drawn by Mather Withington. *Wright* v. *Tukey*, 3 Cush. 290. *Henshaw* v. *Hunting*, 1 Gray, 202. This location was obviously the result of a mutual agreement between the officers of the town and the proprietors of all the lands over which it extended, and indicates, certainly to some extent, the views and purposes of the latter in relation to the division, partition and appropriation of their respective estates.

Five years afterwards all the tenants in common of the Bird lot, except Harriet J. G. Denny, instituted legal proceedings for its partition. The report of the commissioners making the

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division, in pursuance of an adjudication to that effect, was returned into court in April 1810, and was there accepted and entered of record. From the whole of this report the implication is of the strongest kind, that none of the petitioners at that time made any claim or set up any title to any land or flats lying westerly of the line of B Street; but on the contrary that they did expressly claim all the flats adjoining their upland, included within lines drawn from points at the exterior limits on the shore, parallel to B and C Streets, and carried out to low water mark. And the partition was made accordingly. The commissioners, recognizing the location of streets in South Boston made by the selectmen in 1804, as delineated on the plan of Mather Withington of that year, make a subsequent plan by the same surveyor, corresponding with that one, a part of their description of the several lots set out in severalty to the tenants in common of the Bird lot. All the streets which extended to the sea were, in express terms contained in the location made by the selectmen, continued upon the flats into the sea as far as the right of the several proprietors extended; that is, to low water mark. *Henshaw* v. *Hunting*, 1 Gray, 206. And each of the lots bounded on the cove were in like manner, in the partition made by the commissioners, continued to the same line. Thus the first lot, which was assigned to Perkins, was bounded on the one side by B Street, and on the other by a line drawn from a point on Second Street eighty two and one half feet distant from B Street and parallel to it to low water mark. The next adjoining lot was assigned to Mason, and was bounded by Second Street, by low water mark, and by lines parallel to B Street. All the other lots assigned to several petitioners tenants in common, were described as bounded by like parallel lines. This whole partition was therefore necessarily predicated upon the assumption that the owners of the Bird lot had no interest in, or right to, any of the flats situated westerly of B Street. The report of the commissioners making this partition having been returned into court and duly accepted, the judgment rendered upon it is conclusive upon all the parties to it.

It appears that Perkins and Mason subsequently made convey-

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ances of the two lots assigned to them, bounding on the cove; and that by intermediate conveyances these lots became the property of Cains, who was the owner of them in 1845, when Mr. and Mrs. Denny made their deed to the demandant. All the other tenants, who were parties to the legal proceedings, as far as anything is known upon the subject, acquiesced in the division, and it is not shown, nor does it in any way appear, that either Mrs. Denny, who was the sole respondent in that case, or the owners of the land west of B Street, ever made any objection, or set up any claim in opposition to or inconsistent with it. This uniform acquiescence in the partition, for a period of at least thirty five years, by all parties interested in the Bird estate, and the positive action in conformity to it by some of them, without any resistance or objection made to it by proprietors of the adjoining upland, would seem to be amply sufficient to justify the presumption that before it was made the several proprietors of the flats lying within that part of the cove had, by proper instruments of release and quitclaim, established B Street as the boundary and line of division between the land of the owners of the Bird lot on the one side and the owners of the upland lot adjoining it on the west. And giving the just legal effect to this presumption, it becomes apparent that the rule established by the decision in the case of *Gray* v. *Deluce* is no longer to be resorted to, in order to ascertain the rights of the parties; but they are all bound by the convention into which it is to be considered that they have voluntarily entered. In this view, it is also apparent that no part of the flats west of B Street belonged to Mrs. Denny when she made her deed to the demandant, and consequently that the demanded premises could not have been conveyed to him by it.

But whatever may be assumed to have been her right or interest in the flats west of B Street, whether as tenant in common or as sole owner, in consequence of that land having been left undivided under the proceedings for partition, it is very clear, upon a proper construction of the deed, that the demandant acquired no title thereby to any portion of it. The deed purports to convey but one single parcel of land. It is de-

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scribed as "a certain piece of land and flats," bounded on the west by the land of Cains, and by a line parallel to B Street and at the distance of one hundred and sixty five feet from it, and by certain clearly designated lines on its other sides. This description is exact, and applies in explicit terms as well to the flats as to the upland. The true meaning of the further expression "all the flats to said land belonging," is, that the flats are contiguous and attached to the upland, the whole constituting one entire and compact parcel. Nor is the grant enlarged by the further recital in the deed, that the grantors, without intending to enter into any covenants of warranty as to the courses of the side lines over the flats, meant to sell and convey the described upland "together with all the flats to said Harriet J. G. Denny belonging, situated on the westerly side of a line beginning at a point on Second Street three hundred and thirty feet easterly from B. Street, and running northerly at right angles with Second Street." The only effect of this additional description is to assure to the grantor all the right and interest which Mrs. Denny acquired by means of the proceeding under the petition of the other tenants in common for partition. That is, that the grantors meant to convey all the flats within the parallelogram between the land of Cains, originally set off to Mason, on the one side, and the land set off to Helena Augusta Gardner on the other, if by means of the partition Mrs. Denny acquired a title thereto; but that they would not assume the responsibility of warranting that she did thereby acquire a title to the whole of it. It follows as a necessary consequence that the demanded premises, being in no part contiguous to or connected with the particular "piece or parcel of land and flats" described in the deed, but separated from it by the intervening parcels set off and assigned in severalty to Perkins and Mason, which were subsequently conveyed to Cains, were not included in the description contained in the deed of the estate sold, and did not therefore pass by it to the demandant.

On both grounds therefore he fails to show that he is entitled to maintain his action; and the nonsuit ordered must be affirmed, and *Judgment entered for the tenants.*

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President, Directors & Company of the Atlantic Bank *vs.* President, Directors & Company of the Merchants' Bank.

By a fraudulent conspiracy between the paying teller of the Merchants' Bank, the teller of the Atlantic Bank, and a broker, the broker drew a check on the Merchants' Bank, where he had no funds, which the paying teller marked "good," and the broker took it to the teller of the Atlantic Bank, who gave him the money for it in current bills, partly on the Atlantic Bank and partly on other banks. The broker took these to the Merchants' Bank, and gave them to the paying teller, who, for the purpose of covering a deficit, unknown to any other of the bank officers, in his cash, which was to be counted that afternoon, placed them with it. The purpose for which the money was obtained was known to the two other parties, but no other officer of either bank knew anything of the transaction. The paying teller's cash was produced by the cashier to the directors, and counted by them that afternoon, approved and returned to him. The next morning he committed suicide, the check was presented at the Merchants' Bank and payment refused. *Held*, that the Merchants' Bank could not hold the money as against the Atlantic Bank, and were liable to the latter, after demand, in an action for money had and received. Bigelow and Merrick, JJ. dissenting.

Action of contract to recover $25,000, as money had and received by the defendants to the plaintiffs' use on the 26th of March 1855, with interest. Writ dated May 3d 1855. Answer, that the defendants never received the money, and did not owe it or any part of it to the plaintiffs.

At the trial before *Bigelow*, J. it appeared that the sum sought to be recovered was taken from the Atlantic Bank, by a fraudulent conspiracy between Richard Ward, teller of that bank, Thomas W. Hooper, paying teller of the Merchants' Bank, and Augustus S. Peabody, a broker, to cover a deficit in Hooper's cash, which was about to be counted, and was used by Hooper for that purpose; and that before it was returned Hooper committed suicide.

Peabody testified as follows: "I was a stock and exchange broker in Boston from 1845 till September 1855. On Monday, the 26th of March 1855, I drew a check on the Merchants' Bank for $25,000, and Thomas W. Hooper, late the paying teller of that bank, wrote across its face the words, 'Good. T. W. Hooper, Teller.' A quarter before two o'clock on the same day I obtained upon this check from Richard Ward, late the paying teller of the Atlantic Bank, $25,000 in bank notes; $16,000 in

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Atlantic Bank bills of $500 each, and the residue in bills of other Boston banks. At precisely two o'clock on the same day I delivered them to Hooper at the counter of the Merchants' Bank. I waited till he counted the bills and pronounced them correct; I then saw him take the Atlantic Bank bills, and put them into a strap, which he marked with his pen and ink; the remainder of the bills he put into another strap, which he also marked; both of these packages he then put into the drawer in which he kept the money which he usually paid out. I had applied to Ward for the money at Hooper's suggestion.

"On the previous Thursday I drew a similar check, and at Hooper's suggestion applied to Ward for the money for it, stating to him that they were going to count Hooper's cash that day, and that Hooper wanted to know if he would let him have that till next day; that he might send in the check on the next day and he would pay it, and the Atlantic Bank should not lose any credit (specie credit) thereby. Ward then gave me a specie credit for $15,000, and $10,000 in bills, which I carried to the Merchants' Bank, and gave to Hooper; the bills I saw him put in the drawer; what disposition he made of the specie credit I don't know. The next day (Friday), being in the Merchants' Bank in the morning, Hooper said to me, 'I did not have occasion to use that money yesterday, and you had better take this down to Mr. Ward,' handing me, at the same time, a Merchants' Bank specie credit for the same sum I had given him the day previous, and the balance in bills, making up $25,000. This amount I carried to the Atlantic Bank and gave to Ward. He gave me back my check, certified by Hooper, which I carried to the Merchants' Bank, and handed to Hooper, as a voucher that I had paid it.

"On the following Monday Hooper sent for me to come to the bank, and said, 'I shall want that money to-day.' I took a blank and filled out this check, and handed it to Hooper, who returned it to me, with the words, 'Good. T. W. Hooper, Teller,' written upon its face. I then went to the Atlantic Bank, and handed the check to Ward, and said, 'They are going to count the cash to-day at the Merchants'. Mr. Hooper

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wants that.' Ward handed me the bills, which I carried to the Merchants' Bank and gave to Hooper. He gave me no receipt or other evidence of my having left the money. I did not speak to any one at the Atlantic Bank, except Ward, in regard to the check. I had no bank account then at either bank. The bank bills delivered by me to the Merchants' Bank were not in payment or on account of any liability of my own.

"I had no conversation with any officer of the Merchants' Bank till the following day, when I learned of Hooper's death, and immediately went to the Merchants' Bank, and told Mr. Haven and others who came in, I think directors of the bank, all the circumstances attending getting the money on the check, and giving it to Hooper. Upon my telling Mr. Haven there were two checks drawn by me for $25,000 each, he said, very emphatically, 'The bank will not pay them; when they are presented, I shall give instructions to have them sent back at once; Mr. Hooper had no authority for certifying checks.' He questioned me closely as to why I gave the checks; what representations Hooper could have given me which should have led me to draw the checks. He said that he was sorry I did so, as it placed me in a bad fix."

Ward testified: "I was teller of the Atlantic Bank in March 1855, up to the 29th. I received this check from Peabody on the 26th of March 1855. I paid the money for it, $25,000, in bank notes, of which $16,000 were in bills of the Atlantic Bank, and the remainder, $9000, in bills of other Boston banks. The $25,000 were owned by the Atlantic Bank. I took the bank bills from the drawer in which I kept the money, and put the check into the drawer. I had no authority from the president or directors to pay this check.

"I let money go on a check like this on the Thursday previous, to Peabody. I then gave him $10,000 in Atlantic Bank bills of $500 each, and $15,000 in a specie credit. A specie credit is a slip of paper on which is written the name of the bank, the date and amount of the credit. The slip is headed with the name of the bank, and not signed. The next morning, Friday, Peabody came in and brought me $10,000 in bills,

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and a specie credit of the Merchants' Bank for $15,000, a different credit. I cannot recollect whether or not the bills were the same. The transaction of March 23d was not known to the president and directors of the Atlantic Bank.

"It was my practice to make a list of bills and checks against every bank, and send it as soon as I could after the bank opened. The Merchants' and Suffolk Banks did not settle in the morning. They would say: 'The Atlantic owes;' and the messenger would leave the list, and at twelve o'clock we would settle, and we would send in what we received between nine and twelve. If they sent back anything, it was by the messenger of the Atlantic Bank. It is the duty of the paying teller to make up the account. I sent a list, on the morning of 27th March, to the Merchants' Bank, of all I had, except the check dated the 26th for $25,000. I sent checks, bills, &c.

"I put the check for $25,000, which I received from him on the 26th of March, in the drawer with the ordinary funds of the bank. I make up my accounts daily. I called each of these checks for $25,000 money.

"On the 27th of March the slip or list from the Merchants' Bank came to the bank before ten o'clock in the morning. It was not in Hooper's handwriting. The check of the 26th of March for $25,000 was sent in before noon to the Merchants' Bank, with my second list and $2,729.65 Atlantic Bank bills, which, with this check, made the accounts even. This check came back, and I then spoke to the cashier about it, and by his direction I gave them a specie credit of $25,000. After I had given the credit, I took the check to the cashier, and gave it to him. This was before twelve o'clock. The first that the president or directors of the Atlantic Bank knew of this check was in that forenoon.

"I heard of Hooper's death about ten o'clock in the morning of the 27th of March. It was after my messenger had returned, and not from him, that I heard of it."

Benjamin Dodd, cashier of the Atlantic Bank, testified: "The first I saw of the check of March 26th was about eleven o'clock in the morning of the 27th. I had no knowledge of the

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check of the 22d of March, and the transactions connected with it, until some time in April. Ward had no authority to make any loan to Peabody.

"Ward, on the 27th of March, handed me the check dated March 26th 1855, and said he had sent it up and it came back. I handed it to the messenger with directions to go up and demand payment. The messenger returned the check unpaid, and it was put in the hands of a notary and protested before two o'clock for non-payment.

Franklin Haven testified: "I am the president of the Merchants' Bank, and was in March 1855. Thomas W. Hooper was paying teller of the bank during the month of March 1855. The words, 'Good. T. W. Hooper, teller,' written across the check, are in his handwriting. Hooper had no authority in behalf of the Merchants' Bank to make it."

"We count our cash once a quarter, in accordance with an established practice. It was usual to give notice at two o'clock, or about that time, to the teller that cash was to be counted, so that he might be there. On the 26th of March 1855, the directors agreed to return after bank hours in the afternoon and count the cash. I stated to Hooper as I passed out of the bank, at a quarter before two o'clock, that the cash would be counted that afternoon. Hooper was the first teller; he is accountable for all the cash. His cash should correspond with the first bookkeeper's balance. I returned about three o'clock. Hooper was in the business room. We counted in the directors' room. I took all the checks out of the drawers of the receiving and paying tellers after they had listed them. I made a list of them. This took me an hour. At four o'clock Luke Fay, a director, came in. No director had been in meanwhile. The money was brought from the general banking room into the directors' room by Stimpson, the receiving teller. The bills were assorted in packages of the respective banks. I noticed and was annoyed at the large amount of Grocers' Bank bills — $73,000. I then observed two packages of Atlantic Bank bills: one of $16,000 in bills of $500 or $1000 each; and the other of $31,000. The amounts did not attract my attention. My curi-

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osity was excited by finding two packages. I put the question to the cashier, 'Why there should be two packages?' He said he did not know. On hearing this, Fay asked, 'Why should it be known outside of the bank that the cash was to be counted?' I said, 'Perhaps one of the directors mentioned it.' He said, 'No; it did not come from them.' Just then Hooper came into the room, and I put the same question to him about the Grocers' and Atlantic bank bills. This was before I had given Hooper back his cash. To my question Hooper replied, 'I took part of the Grocers' bills for New York funds. A part of the Atlantic bills were in exchange for our bills.' I think he said 'taken of Peabody.' Bearing in mind what Fay had said, I said to Hooper, 'Have you said anything about counting the money?' He replied, 'No; you did not tell me till just two o'clock; I had no opportunity of telling any one.' We were then in process of counting the money. The checks, bills and specie were found to agree with the balance of cash, as stated in the ledger. I then put the question to the cashier, 'If he had ever seen anything in Hooper that would lead him to suppose he would favor banks or brokers?' He replied, 'No; I believe him to be a strictly honest man.'

"The cash having been counted and found correct, Hooper was called in, and I told him we were satisfied, and to take his money. He gathered up his money, put it into the trunks, and locked it up and took it away. I remained with Fay in the directors' room, made a record of counting cash, and Fay and I certified it in the directors' record, as usual. The balance of cash is verified by these quarterly accounts. A certificate is made by directors of the result of the examination, and the cash is then delivered back to the teller. This is the usual course, and was done at this time. I had no suspicion of his integrity. I had no suspicion whatever that these bills were not all the property of the Merchants' Bank. I had not the slightest suspicion that they were obtained by fraud, or improper dealing with any person whatsoever. The delivery over to Hooper was precisely as usual. I don't know how soon he left the banking room. I should think it was nearly six o'clock when

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I made the record. After we had finished with Hooper and delivered him back his cash, I put the question to Fay, 'Who told you that the money was to be counted?' He replied, 'A friend of mine said he knew that I was coming to a counting of the cash this afternoon, and that friend did not care to have his name mentioned.' I said, 'Not care to have his name mentioned? What did he say?' Fay replied that he said he knew I was coming to count the cash that afternoon, and that he should know it when we counted it again. This was the first Fay said on the subject, except to ask the question why it should be known that the cash was to be counted. I then said to Fay, 'After such a communication, it is due to the bank and Mr. Hooper that his cash should be counted suddenly.' Fay said, 'Hooper is certainly an honest man.' I said, 'I do not doubt it; but such a statement being made, it devolves on us to have another count. You and I and the cashier will count his cash some day this week.' I separated from Fay and went home, not having any suspicion against the integrity of the teller. I most certainly should not have handed the cash back to the teller if there had been a deficit. After the cash was handed back to him, he was left with its entire control, in the usual way, and no one to watch him.

"The next morning I came down to the bank a little earlier than usual. Hooper was just entering the bank when I arrived. I said to Hooper, 'I want to speak to you.' He followed me into the directors' room. I said, 'Mr. Hooper, I asked you yesterday if you had told any one that the money was to be counted?' He said, 'No; I told you I had not.' I said, 'Such a communication as that disturbed me a little, and I felt that I would speak to you, and ascertain if you had named it to any one.' I asked why it should have been alluded to outside of the bank. I told him I put great confidence in him, and should be satisfied with his answer, and wished, if there was any trouble in his private affairs, he would divulge it to me. He said emphatically, 'The cash is right. You have examined it, and know that it is right, and I have nothing to divulge.' He reiterated what he said about the Grocers' and Atlantic bills.

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and said: 'I told you how those bills were got;' and I told him I was satisfied. Hooper then said, 'I should like to be absent a few days to go to New York.' I said, 'Why be absent, Mr. Hooper? I told you I would be satisfied with your statement. I don't wish you to go.' He replied, that it had been his intention to go to New York the day before Fast, and be absent to the end of the week; and he should feel better to go now and come back at the end of the week, when I should be satisfied that the cash was right. I said, 'I don't wish you to go, but do as you please. If you see fit to go, go, and deliver your money to Mr. Stimpson.' He then said, 'You and the directors have put great confidence in me, and I am much obliged to you for it.' I did not displace him. I then turned to a person who had been waiting for me. I did not leave the directors' room for half an hour after Hooper had left it. I then went into the banking room, and saw the cashier in Hooper's place. I had not entertained the slightest suspicion of Hooper's integrity; and his emphatic contradiction had given me the utmost confidence in him. I supposed that he was not to leave the bank till the close of business hours that day, and then come back on Friday or Saturday and resume his duties.

"The check for $25,000 was presented to the Merchants' Bank for payment when I was present. Payment was refused. It was replied, 'No funds to pay it; the check is not good; it is a fraud.' I cannot say what the words used in reply were. I think I said Hooper had no authority to certify. He had no authority. We paid no money on account of this check. A demand for the money was made on the 9th or 10th of April 1855.

"I knew afterward that Hooper did not go to the counter on the morning of the 27th, but he had full authority and was directed to go and take his place as usual. Stimpson took his place by my direction; the fact was communicated to me that Hooper had not taken his place, at half past nine o'clock. I heard of Hooper's death before half past ten o'clock. After I heard of this, Peabody was in the bank that morning. He communicated to me the origin and the transaction of the

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check of $25,000, dated March 26th. I immediately made known his statement to the directors. I referred him to the directors as they came in, to make his statement to them."

Luke Fay testified: "I attended the counting of the cash on the 26th of March. We found the cash all right. I did not find anything or see anything in the cash which led me to distrust the integrity of Hooper. I saw the money handed back. If I had had the slightest suspicion of his integrity, or had found any deficit, I would not have assented to the delivery of the cash back to the teller."

The plaintiffs offered to surrender the check of March 25th 1855, and put it on file for the protection of the defendants.

Upon the evidence introduced by the plaintiffs, (the material parts of which are above stated,) the defendants offering none, the case was taken from the jury and reserved for the determination of the full court; with an agreement that the court, drawing such inferences of fact as a jury would be warranted in drawing, should enter such judgment as the law required, or order a new trial, if in their opinion one ought to be granted

The arguments were made at November term 1857.

C. B. Goodrich & W. R. P. Washburn, for the plaintiffs.

R. Choate & A. H. Fiske, for the defendants.

Shaw, C. J. The amount in controversy in the present case is sufficient to give it a character of importance, and the principles on which it is to be decided require careful consideration. It is an action brought by one regularly incorporated city bank against another, to recover the sum of $25,000, which it is alleged by the plaintiffs has been fraudulently transferred from their own possession to that of the defendants, and the latter have no right in equity and good conscience to hold it against the plaintiffs. The action was commenced on the 3d of May 1855, being *indebitatus assumpsit* for the above named sum and interest thereon The answer denies that the defendants owe the amount as alleged.

There is no great conflict of evidence now on any material point, and the case upon the evidence is substantially this:

Thomas W. Hooper, who was the paying teller of the Mer-

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chants' Bank, was a defaulter to a large amount. He was the principal teller, and had the immediate charge and custody of the cash funds within the bank; and other officers, who were necessarily entrusted with cash, accounted with him daily. In theory therefore he had, and at all times ought to have in his control, cash — that is always, be it understood, specie or bank notes — to the amount which he would appear to be charged with by the balance of the bookkeeper's account. That balance perhaps could not be struck till the close of each day's business, because during business hours each day the balance might be constantly shifting by the passing transactions.

It was the practice of the directors to examine and count the teller's cash occasionally, ordinarily as often as once a quarter. The purpose of this examination and count was to ascertain whether any cash had been withdrawn. The teller having no occasion and no authority to pay or receive money outside of the bank, if there was a deficiency it must be attributed to fraud or mistake, and it would afford one means of detecting either. On Monday, the 26th of March, shortly before the close of bank hours, the president gave notice to Hooper, the teller, that he and a committee of the directors would attend that afternoon to examine and count his cash. The object of giving this notice was that he might be there with his keys, ready to produce the cash as called for. Short as the time was, it gave Hooper an opportunity to carry into effect a fraudulent scheme, by which he was to obtain a sum of money to place with his own, whilst being counted, and thus fraudulently to conceal from the directors a knowledge of his defalcation.

A conspiracy had been deliberately entered into, between Hooper, the defaulting teller of the Merchants' Bank, Ward, a teller of the Atlantic Bank, and Peabody, a broker, to this effect; that Peabody should draw a check on the Merchants' Bank, where he had no funds, for $25,000; that Hooper should certify it to be "good;" that thereupon Peabody should take it to Ward at the Atlantic Bank, receive $25,000 of the bills of the Atlantic Bank, or other cash funds, take them back and deliver them to Hooper, to be placed with his own cash funds, and be

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counted with them, as his own; after they had been so used, Hooper was to deliver back the like amount of $25,000 to Peabody, to be delivered to Ward, and replaced with the funds of the Atlantic Bank. In confirmation of this conspiracy, and that it was deliberate, it appears that the same thing had been actually practised on Thursday of the previous week, when Hooper had notice that his cash was to be counted; but that notice for some reason was not acted on, and the cash was not counted; the $25,000 taken from the Atlantic Bank in the manner before stated was restored to them by Ward, their teller. The same thing was again done on the 26th of March, near the close of bank hours, after the notice to Hooper, that his cash was then to be examined. Peabody drew the check, Hooper certified it "good," Peabody carried it to Ward at the Atlantic Bank, and received from him $16,000 in bills of the Atlantic Bank and $9000 in bills of other banks, carried them to Hooper, passed them to him over the counter of the Merchants' Bank, and they were placed by Hooper with the funds of that bank, of which he was the ordinary keeper within the bank. Peabody and Ward both knew of the purpose for which Hooper wanted the money; and it was the understanding between all of them, that the money was the next morning to be returned to Ward, and replaced with the funds of the Atlantic Bank, as had been done the week before, when taken for a similar purpose. The delivery of the money from Ward to Peabody was without the authority or knowledge of any other officer of the Atlantic Bank.

Pursuant to the notice given by the president of the Merchants' Bank to Hooper, the cash of that bank was counted on the afternoon of the 26th of March, by Haven, the president, and Fay, one of the directors. The above $25,000 was included and counted with the teller's cash, the amount was found to be correct, and a certificate to that effect was made and entered in the minutes of the directors. After it was thus counted, the whole amount was returned to Hooper, who put it into his trunks, locked them, and returned them to their usual places in the bank.

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During this examination the suspicions of the president were somewhat excited by finding, as he thought, an unusual amount of the bills of the Grocers' Bank, and by finding two large packages of Atlantic Bank bills, and he questioned Hooper about it, but he had no suspicion at that time of Hooper's dishonesty.

During the same afternoon, Fay stated to the president, that it was known outside the bank that the cash was to be counted that afternoon; and Hooper was asked if he had said anything about counting the money; and he said he had not.

After Hooper had received back his cash and left, some conversation took place between Fay and the president, in which they expressed their confidence in the honesty of Hooper, but their surprise at the singular circumstance that it should be known out of the bank that the cash was to be then counted; and a proposal was then made and assented to have to another examination as soon as convenient, suddenly, that is without previous notice to the teller.

In consequence of these feelings the president determined to speak with Hooper the next morning. He went to the bank earlier than usual, a little before the ordinary bank hour for opening. Hooper was then just entering the bank; the president wished to speak with him; and they went into the directors' room, when a conversation followed which is thus related in the president's testimony: "I said, 'Mr. Hooper, I asked you yesterday if you had told any one that the money was to be then counted.' He said, 'No, I told you I had not.' I said, 'Such a communication as that disturbed me a little, and I felt that I would speak to you, and ascertain if you had named it to any one.' I asked why it should have been alluded to outside of the bank. I told him I put great confidence in him, and should be satisfied with his answer, and wished, if there was any trouble in his private affairs, he would divulge it to me. He said, emphatically, 'The cash is right. You have examined it, and know that it is right, and I have nothing to divulge.'" Some other conversation took place. Hooper thanked the president for the confidence the directors placed in him, and expressed a wish to go immediately to New York, where he had been in-

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tending soon to make a visit. Haven discouraged his going there, but told him, if he saw fit to go, to go, and deliver his money to Stimpson, the receiving teller; not expecting however that he was to leave before the close of business that day. Haven did not displace him, and entertained no suspicion of his integrity Haven did not go into the banking-room till half an hour after, and then saw the cashier in Hooper's place. After the counting, the president and committee would not have handed back the cash to Hooper if there had been a deficit; it was handed back to him and left in his entire control, in the usual way, without any one to watch him.

It appears that Hooper did not take his place in the bank room the next morning, and before half past ten committed suicide.

It further appears that on the 27th, after the death of Hooper by suicide had become known, Peabody, and afterwards Ward, went into the Merchants' Bank, and fully disclosed to Haven and other directors the facts and circumstances under which the check for $25,000 had been drawn by Peabody, and certified "good" by Hooper. Haven said to him, that Hooper had no right to certify such check, and the bank would not pay it.

In the morning of that day, according to the usual practice of Boston banks, Ward, the teller of the Atlantic Bank, received from the Merchants' Bank, by the messenger, the $16,000 of their own bills, and the $9000 of bills of other banks; and Ward, in his official capacity, gave the Merchants' Bank credit for that amount, together with some few other bills. This was before the death of Hooper was known. The check was not then sent. But subsequently the check was sent with other funds, after the death of Hooper was known, but before twelve o'clock. The other funds were received by the Merchants' Bank and credited, but the check was refused payment, and subsequently on the same day protested by a notary public for nonpayment.

Perhaps it may not be necessary to state the facts more particularly; some others may be referred to hereafter.

In the first place, it is obvious that this sum of $25,000 in cash — bank notes, used and treated for most purposes as cash,

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in the same manner with specie — was transferred from the plaintiff bank to the defendant bank by means of a gross fraud and conspiracy, deliberately formed, carried into effect by three persons, with steady purpose and perseverance, attended with as much criminality and turpitude as can well characterize any transaction where rights of property only are violated. Hooper, the paying teller, intrusted with the actual custody of the whole cash of the Merchants' Bank, was under an old defalcation which he designed fraudulently to conceal; Peabody, a broker, and Ward, a confidential officer of the Atlantic Bank, entered into a fraudulent conspiracy with Hooper, with a full knowledge of his criminal purpose, to enable him to conceal this defalcation from his employers, first by abstracting the funds of the Atlantic Bank by an embezzlement amounting to larceny, and subsequently to defraud the Merchants' Bank by a similar embezzlement to be practised by Hooper. It is immaterial to any question here, who of these parties was the first to propose the scheme, or what motive personally actuated them respectively; they each knew of the criminal purpose, and each contributed in his own measure to accomplish it. It was a criminal conspiracy to do an unlawful act by unlawful means. The first act was that of Hooper, in indorsing Peabody's check.

The next consideration is, that by means of this fraud the money was taken from the Atlantic Bank, without their authority, and for which they received no consideration, and went directly into the cash funds of the Merchants' Bank, for which they paid no consideration; unless it was to be deemed a lawful payment of Hooper's defalcation, which we shall consider afterwards.

It was the property of the plaintiffs when it left their bank; the guilty agents, including Hooper, with full knowledge of the fraud, could acquire no title to it against the plaintiffs; Hooper could therefore give no title to the bank, as of right; nor could the bank hold the bills as negotiable securities, transferable by delivery, taken for a good consideration and in the ordinary course of business, nor as money, without some consideration paid. It appears therefore to be the ordinary case where one

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party has received money, the property of another, which rightfully, equitably and in good conscience he cannot hold, and therefore the action of assumpsit for money had and received will lie for it.

It may be proper to consider whether money had and received is the proper remedy, or whether the action should have been in tort for the conversion of the bank bills. It appears that $16,000 of the $25,000 taken from the Atlantic Bank was their own bills. Had these been new bills, never issued by the bank, a scruple might arise, whether the bank without having delivered them would be bound as contractors. It is said that on this ground the Bank of England never issue a bill the second time, but take it up and cancel it. But here it is the universal custom of all banks to issue the same bills *toties quoties;* so that when a bank bill duly executed is abroad, in the hands of a *bona fide* holder, the law will presume that it has been issued by the bank, and hold them to pay it. Stealing or embezzling from a bank their own notes, duly executed, and kept as cash to be paid out whenever the bank has occasion to make payment, has the same injurious consequences of defrauding the bank, as the taking of the bills of other banks held by this bank; and the impossibility of identifying such notes, when out, as notes thus stolen, leads practically to the same result. Where the question is of an intent to defraud the bank themselves, and also to defraud other persons, stealing from a bank their own notes is to be considered an offence of the same character as that of stealing the notes of other banks. We do not perceive therefore that any distinction can be made between the $16,000 and the $9000. And the court are of opinion that as the bills in question were used and treated as money, and are now claimed to be held by the defendants as their own cash, the case comes within the general rule, that when bank bills are delivered as money and received as money, they may be considered as money for the purposes of remedy, and that averments of money had and received, money paid, money laid out and expended, may be sustained by proving such payment in bank bills, in the same manner as if paid in specie. Where money in bills was en-

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trusted to a carrier who lost it at play, it was held that the owner might recover the amount of the winner, in an action for money had and received. *Mason* v. *Waite*, 17 Mass. 560. *Cummings* v. *Noyes*, 10 Mass. 433. *Whitwell* v. *Vincent*, 4 Pick. 449.

It is a well settled maxim, that where chattels have been taken without title, and converted, so that the owner might maintain trover, if money has been received for them, he may waive the tort and maintain assumpsit for the money. It seems to follow that when the thing taken without title and converted is itself an article which is ordinarily regarded as money, this action will lie.

It is therefore, we think, to be considered in the same light as if by the same means they had obtained the money from the Atlantic Bank, and transferred it to the Merchants' Bank, in bags of current specie.

But further, it seems to us that these views are rendered entirely unnecessary by the fact, that before either bank had notice of the fraud, by which these bills passed from the possession of the one to the other, the Merchants' Bank, by their authorized officers, presented all the bills, as well the $16,000 of Atlantic Bank bills, as the $9000 of the others, to the Atlantic Bank, and received payment for them. It follows therefore that whether the defendant bank received these bills rightfully or wrongfully, with or without valid title, they presented them to the plaintiff bank, and received of them the full amount in cash; so that if the defendants are responsible in any form, it is strictly for money had and received.

We have said that this money came into the possession and under the control of the Merchants' Bank without any consideration passing from them, unless, as it is argued on the part of the defendants, it was received in payment of a debt due them from Hooper. The argument is this: that Hooper, being under a defalcation to a large amount, which he had kept concealed, obtained the money from the Atlantic Bank, and placed it in the Merchants' Bank, by way of payment of such balance, and that it is immaterial to the bank how he acquired the money to

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pay them with, even if by fraud, if the bank did not know or participate in it. But if the law were so, this argument, in our opinion, cannot be sustained by the facts.

Whether the transfer of a sum of money, from one party to another, operates as a payment of an existing debt or duty, depends upon intention, and the intention of both parties. Such intention may often be implied from their relations and other circumstances. But it must exist. The bank could have no such intention, because, if there was any defalcation, it was not known to them, and any intent to receive this money in payment of such defalcation is negatived.

There was no payment in fact, no delivery of money, actual or constructive, from the hand or power of the one to that of the other. Hooper, by clandestinely placing it with other funds of the bank in his own possession, for the purpose of deceiving the bank, did not part with the control over it; it was still in his own power. Passing it to the committee, for the special purpose of being counted as the bank's, not as his, inducing them by fraud to believe that it was the bank's, and thereby precluding them from any inference or suspicion that it was his, was no act of transfer from Hooper, and could be accompanied by no intent to receive it as payment. Hooper's presenting that sum of money to the committee for that purpose was a significant declaration on his part, that it was all money which, as their officer and agent, he had received as their due, in the regular course of their business; and although this was a gross falsehood, it shows the state of mind in which their officers received and examined his money and returned it, and precludes the idea that they received it in payment.

But in truth it was not the intention of Hooper to transfer the money to the bank, for their own use, in satisfaction and discharge of the sum due them in consequence of his prior defalcations. It was intended to deceive them by exhibiting these bills of which he himself was the keeper, and it was with the expectation and intent, as soon as that object was accomplished, to deliver them back. Such a transaction could no more cancel and pay a debt than the exhibition of the same amount in counterfeit bills.

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If it was a payment, it discharged Hooper and his sureties from all liability for such defalcation, which, as it seems to us, cannot be pretended.

Had this money been found in the custody of Hooper, on examining his cash after his death, and nothing had been shown as to the mode in which it had been acquired, it might have been presumed to have been received by Hooper, in his official capacity, for a valuable consideration, in the due and ordinary course of business, in which case it might well have been presumed to be the property of the bank. Such possession under such circumstances might have been a *prima facie* title. But here there is no room for these presumptions. The proof is, that it did not come into the possession of Hooper in his official capacity, in the ordinary course of business; but was procured and placed there by his fraud.

If the act of the president and Fay, in examination of the money, is relied on, as an admission on the part of the bank that Hooper had accounted for all the cash entrusted to him, and that the certificate entered on the books was a discharge to him; the answer is, that certificate was obtained by fraud and cannot affect the bank; and further, that examination was made *alio intuitu;* it was not an accounting, it was simply an examination, and the whole, when examined and certified, was redelivered to Hooper, and remained in his custody till the next day. In consequence of his suspicious conduct that morning, and his almost immediate death by suicide, other officers of the bank were put into possession of the bills thus left by him.

The argument is, that by the production of the money to the committee, as and for his balance, and by the certificate of the committee, the property and right to the money vested in the bank. But the answer is, that it was not produced as and fo his balance; neither party had any such relation in view.

If the defalcation of Hooper, which was then not known to the bank, but which is now known to have then existed, was not discharged by the production and exhibition to the committee of these bills, then no consideration passed from the defendants to Hooper, or any one else, as the price of these bills, and

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the defendants acquired their possession of them without consideration.

There is however another aspect in which the case may be considered, not essentially varying from the foregoing, but which may bring into view another legal element, that of knowledge of the fraud.

Undoubtedly the law intends, for wise considerations, to give the highest degree of credit to negotiable securities, payable on time not yet expired, taken for valuable consideration, in the usual course of business, without notice of any antecedent fraud or want of title which would vitiate them, the reasons for which are very strong and quite satisfactory. *Wheeler* v. *Guild*, 20 Pick. 545.

The credit given to bank bills in ordinary circulation is still higher, and the actual possession will be accompanied by a presumption of good title. The presumption perhaps is not so strong when bank notes are collected in large sums, and in the dealings of banks with them. Still, the presumption in either case is one of fact, and may be rebutted by evidence. And it will be rebutted in a case where the owner of bank bills proves that certain bills owned by him have been obtained from him by theft or fraud, and have passed from the fraudulent possessor to the defendant with knowledge of the fraud, and, if they have passed through the hands of several persons, that each had knowledge of such fraud. The holder, with the full benefit of the presumption of fact that he has a good title, cannot hold it against one who can prove a prior good title, not rightfully transferred to any one, though without such notice he would have held it. For the application of this principle, actual notice is not necessary; constructive notice is sufficient. In the present case, there is not the slightest ground to suspect that the president or any officer or director of the Merchants' Bank had any actual notice of the fraud by which Hooper obtained these bills from the Atlantic Bank, or that he obtained them at all. They had no knowledge of his defalcation till after his death, when they obtained a knowledge of the facts from Peabody and Ward.

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Had they constructive notice? A bank is a corporation which can only act by agents; all the transactions of the bank, in buying or selling, borrowing and lending, every act by which they can convey property or acquire it, must be done by agents. When any one of these transactions is of such a character, that false representations, practice of fraud, or knowledge of fraud practised by another, would avoid the transaction, if done by an individual, it will equally affect a corporation, if done or had by the agent in the same transaction for a corporation. Suppose a corporation have occasion to obtain insurance, and the agent who negotiates it makes false representations, which would render the policy void, if made for himself; it will render it void as a contract with the corporation his principals; they will be affected with constructive notice. So, if a bank should have occasion to buy a horse for their messenger, and authorize him to buy one, and the agent should find one to his liking, and in negotiating about the purchase, should be informed that another man claimed that the horse had been obtained from him by fraudulent representations; it would be constructive notice of such claim to the bank.

In the present case, treating these notes obtained from the plaintiffs in the most favorable view, either as bank bills, or negotiable securities not discredited, or as specific property, the court are of opinion that the only title acquired in them being through the agency of Hooper, his knowledge of the fraudulent title under which he acquired and held them was constructively the defendants' knowledge, and they cannot hold them against the true owners.

Here the first step was an official act of Hooper, the paying officer of the bank, certifying that Peabody's check was good. It has been held, that a bank teller has no power to bind the bank by such a certificate, even if the fact is true when the check is presented; so that if not then paid, and other checks come in and the fund is paid out on them, the holder of such check has no remedy against the bank. *Mussey* v. *Eagle Bank*, 9 Met. 306.

But in the present case, it was a formal assertion under his

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official signature to a stupendous falsehood. This was done to enable his guilty associates to make use of what appeared to them perhaps to be the credit of the bank. Possibly Ward believed that this was a good security, by means of which he could realize the money from the Merchants' Bank, and replace that of which he was defrauding his employers. At all events, we cannot say that without the intervention of this official act the fraudulent teller could have obtained the money he did. It was solely through the agency of Hooper, that the defendants acquired any title to the bills, or any possession of them. The whole transaction; his falsehood to the officers in saying that he told nobody that the money was to be counted that day, after he had notice from the president; when the evidence shows that this guilty machinery was all put in motion by notice to his guilty associates; all these circumstances show how deeply conscious Hooper was of a guilty purpose. If notice to the agent was constructive notice to the bank, then the bank took these securities under an invalid title, which cannot prevail.

Some cases were cited to show that where an agent has become indebted to his principal, and pays the balance in current money, the principal can hold the money, although obtained by fraud. This may well be conceded to be good law, when the money obtained by fraud is not obtained by the exercise of such agency, the agent makes no contract in behalf of his principals, and they take nothing and claim nothing through his fraud.

It was contended by the defendants, that the plaintiffs had waived their right to proceed against the defendants, and had affirmed the doings of Ward, in taking and claiming payment of the check. But we see nothing in the evidence to warrant this conclusion. No notice was had of the fraud until after the $25,000 in bills had been sent from the Merchants' Bank to the Atlantic Bank, and paid by the latter. That is, they were received and credited to the Merchants' Bank, but, according to custom, no settlement was made. Before twelve o'clock, but after Hooper's death, Ward made out another list, including the $25,000 check, with a few thousand dollars in bills, to pay the

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balance due the Merchants' Bank. It came back by the messenger, rejecting the check; by which their balance of $25,000 still remained due, which the check, if good, would have cancelled. Then the cashier told Ward to give them specie credit instead of the check. The specie credit was not given in satisfaction of the check, but of a general balance due from the Atlantic Bank to the Merchants' Bank. This was no confirmation of the act of Ward in taking this check.

So of the presentation of the check for payment. It was handed to the Atlantic Bank by Ward as a valid security for what it purported to be, a check by Peabody on the Merchants' Bank. The only proper course for the plaintiffs was to present it, and leave it for the defendants to determine whether they would pay it or not; and the protest was of no other effect than to get evidence of the presentment of the check for payment, and the refusal of the defendant bank to pay it.

If the plaintiffs had acquired a right of action, there was no waiver in not bringing it immediately. Nothing done or foreborne by them was the cause of any loss or inconvenience to the defendants, and no act is shown waiving any right.

A case was cited after the argument, which in its facts bears such a resemblance to the present, that it seems to deserve a separate consideration, though upon a careful examination it appears to us to have been decided upon a principle not inconsistent with those adopted in this case. *Ingraham* v. *Maine Bank*, 13 Mass. 208.

In order to compare the two cases, it is necessary to consider who were the parties, and what was the question in the case cited. It was a question, whether the sureties for the cashier's good behavior, on a bond given on the 1st of June, were liable for the delinquency complained of. The cashier was delinquent before the 1st of June, and so continued to October, when an examination of his cash was made by the directors. To meet this, the cashier officially drew checks on other banks, received the money and placed it with his own, but did not credit those other banks with the amount; his cash therefore appeared right. After the examination, he paid those other banks out of the

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funds of his own bank, so that the transaction did not appear on the books of his own bank, and his deficit in fact stood as it did before the 1st of June, when the bond was given. The question was, whether at the time of the removal of the cashier, soon after this last transaction, the deficit then existing was chargeable to the obligors of the bond given on the 1st of June. There the money was borrowed of other banks by the cashier, in his official capacity, and under his general authority, to bind his bank by drafts, and they were responsible to those other banks, although, in the particular case, without any special authority, or any exigency of the bank requiring it. This might have been an act of misconduct on his part, though it would not impair the right of the banks with whom he dealt; unless his unlawful purpose was known to them, which was not suggested. The money thus raised by their cashier on their credit, and mingled with their cash, was their property in all respects; nobody could claim it by any prior title. The cashier's delinquency on that occasion consisted not in drawing the money, but in failing to credit it to the bank from which it was drawn, in order to deceive and mislead his employers. Not having treated the banks of which he borrowed the money as creditors of his bank, he regarded the drafts practically as a personal loan to himself. When therefore he afterwards took the funds of his bank to pay those drafts, it was done to carry out his fraud, to cancel his own debt; it was an unlawful embezzlement, of the character of larceny, practised then, and a violation of his duty, amounting to a breach of the bond given on the 1st of June, so that the sureties on that bond were liable.

The opinion of the court is very short, and does not fully express the grounds on which the judgment was rendered. The court say, that though a deficit existed before the execution of this bond, and might have been covered by an antecedent bond, yet the taking of money afterwards, to pay what he had thus (clandestinely) borrowed, was also a breach of the condition of this bond. "For the money, when placed in the vaults became the property of the defendants" (the bank); "and the transaction cannot be distinguished from an actual payment from his

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own funds to supply the defalcation, and a removal afterwards of the funds of the bank without the consent of the defendants."

It is upon this last paragraph of the judgment, that we think it necessary to remark. In that case, undoubtedly the money was the property of the bank, raised on their credit, and placed with their funds. Besides that, as against the cashier, and those responsible for him, it was so far the property of the bank, that he would be estopped to deny it, and as against them it would be the property of the bank. To take an illustration from the present case, suppose Hooper had had a secret hoard of his own outside the bank, and had procured from that $25,000 and placed it with his own for the examination of the committee, and they for some cause had, after counting it, withheld it and not returned it to him, he could not have reclaimed it; as against him the property would be held theirs. But if, instead of such hoard of his own, he had fraudulently obtained it of another person, it would not be theirs, in a true and proper sense, that is, by a good and indefeasible title. But what is more decisive of the correctness of the judgment in that case is this: The court intimate that the facts taken together would perhaps prove a breach of both bonds, that anterior and that subsequent to the 1st of June; and probably they would. In that case, the breach by the prior misconduct would have caused no damage to the obligees, because by some means, right or wrong, the loss occasioned by it would have been repaired, and the judgment must have been for nominal damages only. Whereas the breach by the subsequent misconduct, in wrongfully withdrawing the funds of the bank, was the very breach by means of which the obligees sustained their loss; and it was no answer by the obligors on that bond, that the misconduct of the cashier originated prior to the bond given by them.

In the last clause the court say, "the transaction cannot be distinguished from an actual payment from his own funds." This shows how necessary and important it is, in construing judicial decisions, to consider them as made with a tacit reference to the subject matter, and the facts and circumstances of

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each case, and with the limitations and qualifications implied thereby. The court say, the money, when placed in the vaults by the cashier, became the property of the bank. True, it did in that case, and would in all cases as against the cashier who had so placed it for such purpose; but they do not mean to say that his placing it there, however acquired, would make it absolutely the bank's, to all purposes; the limitation was not expressed, because not necessary in that case. So "the transaction cannot be distinguished from an actual payment in his own funds," was true as to that case, and with a view to the judgment to be there rendered. The deficit under the first bond had been satisfied by funds produced by the cashier, and which the bank was not answerable to any one else for, no actual damage had been sustained by the bank, and if it could have a judgment it would be for nominal damages, and would afford no defence or relief to the obligors on the subsequent bond. For any purposes of that inquiry the transaction was not distinguishable; but we are not therefore to infer that the bank can hold it against the true owner, merely because the cashier paid it in, if he procured it by such means that the true owner might recover it back. The decision therefore is not repugnant to the one which we now make, which is, that the plaintiffs are entitled to recover.

Merrick, J. Being unable, after the most careful consideration, to concur in the opinion of the majority of the court, it seems to me proper, in a case of so much importance, both in reference to the magnitude of the claim made by the plaintiffs, and to the general principles involved in its decision, to state the reasons of my dissent.

The questions to be determined arise on a report of the presiding judge, which contains a statement of the whole evidence produced upon the trial. By the agreement of the parties, the court, drawing such inferences as a jury would be warranted in deducing from the facts proved, are to enter such judgment as the law requires.

It is in the first place to be noticed that there is no conflict of evidence, and that there is now no controversy or doubt in

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relation to the facts or the transactions which actually occurred. They may be briefly stated. Hooper was the paying teller of the Merchants' Bank. In that capacity he was entrusted with and had in his possession all the cash of the bank, for which he was at all times immediately accountable on demand of the directors; and the amount for which he was so accountable was always shown by and corresponded with the balance of cash charged on the ledger kept by the first bookkeeper. Before the 26th of March 1855 Hooper had secretly and fraudulently abstracted from the cash so entrusted to his care, and had applied to his own use large sums of money for which he was then the debtor of the bank, and legally obligated to make immediate payment. At about a quarter before two o'clock in the afternoon of that day the president notified him that the directors would meet at three o'clock in the same afternoon to count the cash of the bank, and that he would then be required to produce it. Knowing of the deficiency of the cash on hand, which existed by reason of his defalcation, he thereupon forthwith proceeded to supply himself with means which would enable him to present and deliver to the directors the whole amount of cash for which he was then liable, and thus satisfactorily to account to them for all the funds with the care and custody of which he had been entrusted. To this end, and in pursuance of a conspiracy previously concerted between the parties for that purpose, Peabody, who had no funds there, drew his check upon the Merchants' Bank for $25,000, and presented it, Hooper having first certified upon its face that it was good, to Ward, the teller of the Atlantic Bank. Ward, without any right or authority to do so, and knowing the unlawful and fraudulent purpose for which it was to be used, paid to him the amount of the check in money belonging to the plaintiffs, consisting partly, to wit, to the amount of $16,000, of bills of the Atlantic Bank, and partly in bills of other banks. Peabody immediately carried and delivered the same to Hooper, who received and placed all the bills so brought to him in the drawer where he kept the cash of the bank, and there all the bills remained until the arrival of the president at the time appointed for the meeting of the

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directors. All the cash of the bank was then brought from the general banking room and delivered to him in the directors' room. He then commenced the proposed examination; first taking all the checks out of the drawers of the receiving and paying tellers, and making a list of them. Just as he had finished doing this, Fay, another of the directors, came in, and they proceeded to count the bills which had been brought in and presented to the directors as the cash of the bank. The bills of the Merchants' Bank were counted by Fay and the cashier, and all the bills of other banks, including those which Hooper had fraudulently procured through Peabody and Ward from the Atlantic Bank, were counted by the president. The aggregate of all the checks and bills so counted was found to be correct; that is, was found to correspond with the balance of cash charged on the ledger. The directors having thus completed their examination, found that all was right, and that there was no deficiency in the amount of cash to be accounted for, they then, according to the usual course of proceeding upon such occasions, made their certificate that the cash on hand corresponded in amount with the balance charged on the ledger; and they thereupon delivered that certificate to Hooper, together with all the money they had received from him, to be kept by him in his official capacity, for and as the property of the bank as before. This completed the service they met to perform, and they then withdrew, not having the slightest suspicion of the integrity of Hooper, or that any of the bills counted were not the property of the bank, or that any part of them had been obtained by him by fraud or by improper dealing with any other person. But early in the forenoon of the next day, and before any change whatever had taken place in reference to the bills which had been fraudulently obtained from the Atlantic Bank as before stated, the defalcation of Hooper, and the fraud which had been committed by him, in conspiracy with Peabody and Ward, were suddenly discovered, and all the facts became known to the parties who had been defrauded. The plaintiffs thereupon immediately demanded the bills or payment for them of the defendants, to which demand the latter refused to accede, but re-

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tained the bills, and applied them, under a claim of right thereto, to their own use.

When that demand was made, the bills which had belonged to the plaintiffs, and of which they had been fraudulently deprived by the tortious and criminal acts of the conspirators above stated, were in possession of the defendants. And therefore the real and only question is whether, in the circumstances under which they received the money, they thereby did upon the settled and established principles of law acquire a legal title to it, so that it at once became their property. There seems to be no peculiar equity in favor of either of the parties, which should be allowed to affect or vary the application of those principles. The teller of each of the banks had been guilty of gross and inexcusable fraud; and the loss, by whichever of them it is to be sustained, is the direct and necessary consequence of the criminal misconduct of one of their own officers. Their respective claims are therefore to be ascertained on the application of strict principles of law to the state of facts which had occurred, and which existed at the time when the perpetration of the fraud was discovered.

There can be no doubt or uncertainty, nor is any difference of opinion entertained, as to what the rule and principle of law applicable to the case is. This is perfectly well settled. The *bona fide* holder of negotiable paper, payable to bearer or indorsed in blank, who has taken it innocently in the due course of business and for a valuable consideration, may recover upon it, though it came to him from a person who had robbed or stolen it. So if a promissory note or bill of exchange is made without consideration, or is lost or stolen, and is afterwards negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of his business, it thereupon becomes his property, his title to it is indisputable, and he may recover the amount of it from the drawee or maker. 3 Kent Com. (6th ed.) 79. *Wheeler* v. *Guild*, 20 Pick. 545. *Stevens* v. *Blanchard*, 3 Cush. 169. This is peculiarly true in reference to bank bills or notes which circulate as currency; and so it was expressly adjudged in the early case of *Miller* v. *Race*

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1 Bur. 452. And this principle, stated in the plainest terms in the opinion pronounced in that case by Lord Mansfield, has never since been questioned, but has been uniformly approved and upheld, and is now everywhere the acknowledged doctrine of the law. No more direct or positive decisions in affirmance of it can be found than in the adjudications of this court. Thus in the case of the *Worcester County Bank* v. *Dorchester & Milton Bank*, 10 Cush. 488, which was action brought upon a bank bill of the defendants for fifty dollars, which had never been issued by them, but which in a complete state of preparation for issue had been forcibly stolen from the vault of their banking house, it appearing that the plaintiffs obtained and came by the bill fairly, it was determined they were entitled to recover, although they had been informed of the robbery before commencing their suit; and judgment was accordingly rendered in their behalf. In the later case of *Wyer* v. *Dorchester & Milton Bank*, 11 Cush. 51, upon an exactly similar state of facts the same doctrine was again distinctly affirmed; and it was there also held, in conformity to repeated decisions to the same effect in other courts, that the mere possession of a bank note or bill, in the absence of any evidence to control or explain it, affords a conclusive presumption that it was received by the holder for value in the due course of trade, and that he is in such case to be considered the true and lawful owner. *Solomons* v. *Bank of England*, 13 East, 135. *King* v. *Milsom*, 2 Campb. 5. *De la Chaumette* v. *Bank of England*, 9 B. & C. 208.

But no question arises here concerning the burden of proof, for there is no dispute or controversy concerning the facts, which are all clearly developed in the evidence, and perfectly well known. It is therefore necessary only to ascertain the legal effect and consequence of these facts, and whether they show, as the defendants contend that they plainly and incontrovertibly do, that they received the particular bank bills demanded of them and to recover the value of which this action is prosecuted in the usual course of their business, for a valuable consideration and in good faith, without notice, direct or constructive, of the fraud by means of which they were obtained from the plain-

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tiffs. If this is shown, then, on the application of the above stated principle of law, it results as a direct and necessary consequence, that by the transfer to them under such circumstances they became the owners of the bills by a complete and indisputable title. The investigation of the several parts of this general proposition involves the inquiries, when, from whom, and for what consideration, did they receive the bills; did they receive them in good faith; and had they at the time of receiving them any notice, direct or constructive, of the fraudulent means by which Hooper had obtained them.

1. These bills were first received by the defendants at the time when, upon the call of the directors upon Hooper for the cash for which he was accountable, they were carried into the directors' room, and were there delivered to them to be, with the other bills and checks produced at the same time, by them examined, counted and disposed of as the property of the bank. Before and up to that moment, these bills were in his possession and under his sole control. He had indeed placed them for safe keeping in the drawer in which he kept the bills and money of the bank, but he had not passed or attempted to pass them or the property in them to the bank or to any one else until he produced and delivered them to the directors. He procured and kept them strictly for a purpose of his own, and that purpose was simply and solely to exhibit and deliver them to the directors when he should be called upon to account, and when he should profess to account, for the balance of cash charged to him on the ledger, and for which he was, and knew that he was, at all times accountable. He retained them himself, and had it now in his own power, without any obstruction or hindrance from any other person, at any moment before they were so passed over and delivered to the directors, to take them away and restore them to the plaintiffs. And if he had done so, as he might and as he certainly ought to have done, he would not thereby have interfered with the property, or violated any of the rights of the defendants. For as he had the sole and exclusive possession of these bills, and continued to retain and maintain the custody of them until in accounting for his own

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liabilities to the bank he passed them over to the directors, the defendants certainly could not before that was done have received or acquired any title to them.

2. When the defendants thus through their directors received these bills of Hooper, they took them in the due course of their business, and for a valuable consideration. The examination of the assets of the bank, and everything which was done by the directors on the afternoon of the 26th of March, were in accordance with the established practice and the course of proceeding prescribed by the express agreement of the board. The definite and exact object of all such examinations, and particularly of that which was made that day, was to ascertain if the bank was in the actual possession of all the money to which, according to the balance charged on the ledger, they were entitled. And as it is the business of the teller to keep all the cash, and his duty to produce and deliver it to the directors on their demand, such an examination and count of the bills and money by them necessarily involves the full accounting by the teller for the whole cash of the bank, according to his official and personal liability. And accordingly Hooper, being called upon for this purpose, in conformity to the established practice and usual course of proceeding in such cases, produced and delivered to the directors various checks and bills, and among them those which he had fraudulently obtained from the plaintiffs, as the property of the bank. The directors received them all, counted them all, and treated them all, as such, making no distinction, and knowing of none, between the different parcels of which the whole consisted. And in the unsuspecting belief and confidence that all the bills, thus delivered into their possession by Hooper to be examined and counted by them, belonged to the bank, that all was right, and that he had in this way fully accounted for all the money entrusted to his care, and had thereby discharged himself of all his liabilities relative thereto, they accepted the bills and checks so received of him for the bank in full satisfaction and discharge of those liabilities. And thereupon, in exercise of their official discretion and authority, they redelivered to Hooper all the bills they had received from him, that he might

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thereafter keep them for and as the property of the bank. This, as is positively stated in the testimony of both Haven and Fay, they would not have done, if upon their examination there had appeared to be any deficiency in the amount of money which ought to have been found in the possession of the teller; much less, if they had known or suspected that he was a fraudulent defaulter.

It is thus shown that these particular bills, together with all the other bills and checks produced and delivered by Hooper to the directors, the whole being indiscriminately intermingled so far as they could perceive, were received by them for and on behalf of the defendants in consideration of his liability and indebtedness to them for the balance of the money which he had theretofore received, and for which he was then immediately responsible, and that those bills were thus accepted in full discharge of all such liabilities on his part up to that time. That, of course, was a full and valuable consideration.

But in another aspect of these transactions, it has been argued on behalf of the plaintiffs that the defendants did not pay or allow any consideration for these bills; because Hooper did not pay them in direct and avowed satisfaction of the indebtedness which resulted from his defalcation, but used them only to conceal it by diverting in that way for a brief period the attention of the directors, so that they would make no inquiries upon the subject; and because the directors, not knowing of any such defalcation, could not have accepted or received them in payment or discharge of the consequent indebtedness. Without doubt, it was the intention and design of Hooper to cover up and conceal his fraud and defalcation from the knowledge of the directors. But it is equally plain and certain that to effect this purpose he did in fact pass over to them and into their possession all the bills which he delivered to them, in order thereby to account in full for his entire liability for the whole of the money which had been intrusted to him, and for which he was responsible. They received and accepted these bills in due course, and gave to him a corresponding credit and discharge therefrom. Thus in this one material and decisive particular

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each of the parties intended that the bills should be applied to one and the same object. That object was the accounting for, and the consequent settlement and satisfaction of their claim for the balance of cash charged in the ledger; for which balance he then admitted himself to be liable, and the amount of which they were entitled in any event to recover, equally whether they knew, or whether he had in fact been guilty, of any defalcation or not. It is therefore obvious and certain that all the bills which he delivered to the directors, and which they, acting in good faith, received and accepted for that purpose, were transferred to the defendants in satisfaction of their claim and of his liability therefor, and consequently were taken by them upon a good, valuable and adequate consideration.

3. And in accepting all the bills which were delivered to them for that purpose, it is clearly shown that they acted in the most perfect good faith. The directors not only had a right, but it was their duty, from time to time, and at all such times as they should to that end appoint, to call upon the teller to account for the cash and funds entrusted to him and committed to his keeping. In the exercise of that right, and in the usual and ordinary course of proceeding in all like cases, they called upon Hooper to produce and submit to their inspection and examination the money of the bank in his possession. In compliance with that call, he produced and delivered to them divers parcels of checks and bank bills, the aggregate of which they found upon careful scrutiny to be equal to, and exactly to correspond with, the amount of his liability according to the balance charged upon the ledger. They had not the slightest suspicion of his integrity in that or in any other transaction, or that all the bills exhibited and delivered to them did not justly belong to the bank, or that any part or parcel of them had been in any manner obtained of any person by fraud, or by any fraudulent means or practice. Such is the positive testimony of Haven and Fay; and there is nothing in any part of the evidence having the least tendency to create any distrust of the truth of their assertions. Indeed, nothing of this kind is suggested or pretended. If there were any such pretence, the significant fact that at the close of

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their examination they unhesitatingly returned to Hooper all the money of the bank, to be kept by him as before, would be quite sufficient to refute it. This affords the strongest proof that they had no suspicion of him, and that their confidence in his uprightness and integrity remained unimpaired. It is easy to believe them when they say that, if any deficiency had been discovered, none of the cash would have been again and at once intrusted to him; but in view alike of their duty and interest, and of the motives which would probably influence all men in the like circumstances, we may be sure that if they had suspected or found cause to suspect that he had robbed their own, or had been an active participant in a conspiracy with others to rob or embezzle the funds of any other institution, they would not for a moment have thought of again placing their money in his possession, and of affording him thereby further and renewed opportunities to cheat and defraud them.

It is thus clearly proved, and it is in fact substantially conceded by the plaintiffs, that the directors who, in behalf of the defendants, were the immediate recipients of the money paid over to them by Hooper in accounting for his official liability, acted with the utmost fairness and integrity; and that neither they, nor any officer, agent or other person in the employment of the bank, had any direct notice of any of the wrongs which he had committed or of the frauds which he had perpetrated. It follows, as a necessary consequence from these proofs and concessions, that the defendants had no notice at all of the fraudulent means and acts by which he procured the money, unless they are to be affected by an alleged constructive notice, on the ground that the money fraudulently obtained by him came to them through his hands as one of their officers.

It is no doubt true that in general the principal is to be affected by the acts, conduct and knowledge of his agent, when the latter is acting for him, on his account, or within the scope, limits or powers of the agency. But it is not true that he is to be so affected, where one who is for some certain, special, definite and carefully prescribed purpose constituted an agent, does acts which are not within the scope of his duty or authority as

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such, but wholly beyond and different from it; and does them solely and exclusively for himself and for his own benefit and advantage. In all such cases he alone is responsible. All the consequences of his acts attach exclusively to him, and are not to affect or to be shared in by any other person who, for other and wholly different purposes, may stand to him in the relation of a principal.

As soon as these plain and familiar rules are applied to the facts in the present case, it becomes at once apparent that the defendants cannot be charged with constructive notice on account of the knowledge of Hooper of his own misconduct and criminality. In nothing that he did to carry out, with the aid of his guilty associates, his premeditated scheme of fraud and deception, either in obtaining the money from the plaintiffs, in secreting it for a brief time in his own drawer, or in the exhibition and presentment of it to the directors, was he acting or assuming to act in his official character or relation, or as an officer or agent of the defendants. On the contrary, his position and proceedings were in every respect adverse and antagonistic to them. He acted solely for himself, and for the accomplishment of his own secret and unlawful purposes; exclusively for his own interest, his own protection, and to secure to himself continuance in office, and thereby renewed and prolonged opportunities of dealing with their money at his own pleasure and in execution of his own fraudulent designs. He meant to deceive them; he got the money and used it for that purpose. He undoubtedly intended, first to pay it to the bank in satisfaction of his liabilities, and, as soon as possible afterwards, to withdraw, embezzle and apply it to his own use. And if the hour of detection and exposure had not suddenly and unexpectedly occurred, he probably would, as he promised his associates, have withdrawn the same or an equivalent amount of money, and have restored it to the plaintiffs. But he was detected and lost the opportunity of consummating his intentions in this particular; and his failure and miscarriage at last cannot qualify or affect the rights of the defendants or the character of his own preceding acts. These fraudulent acts of his having

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been in every respect, in deed and purpose, hostile and contrary to his duty towards them, and concealed, as they were intended to be, wholly from their knowledge, are not to be construed as affording constructive notice to them of the way and manner in which he obtained the money which they in good faith received from him.

From these considerations it appears to me to be clearly and conclusively shown that the inferences and the only inferences which a jury would be warranted in deducing from the evidence and from the facts proved or conceded on the trial are, that the money which Hooper fraudulently obtained from the plaintiffs was delivered by him to and received by the defendants in the usual and ordinary course of their business, for a full and valuable consideration, in good faith and without notice, direct or constructive, of the fraud perpetrated by him in obtaining it. This proposition being established, the necessary legal conclusion from it is that, when the money was so received by them, they acquired a perfect and complete title to it, and that no action can be maintained to recover it from them. I think therefore that, in pursuance of the agreement of the parties, judgment should be entered for the defendants.

In this conclusion, for the reasons before stated, I am authorized to say that Mr. Justice Bigelow fully concurs.

*Judgment for the plaintiffs.**

* See *Skinner* v. *Merchants' Bank*, 4 Allen, 290.

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Samuel Henshaw & another *vs.* Bank of Bellows Falls.

A railroad corporation, empowered by law to mortgage their franchise and property, after making a mortgage of all their lands, franchise and privileges, and "all the locomotive engines, cars and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use," authorized their directors to issue bonds to the amount of $1,200,000 to pay debts contracted in building and furnishing their road, and to secure such bonds by "an additional or second mortgage of the road, franchise and property of every description, including cars and engines," subject to the first mortgage, and "as full and complete" as that. Pursuant to this authority, bonds were issued, and a second mortgage made of all the lands, franchise and privileges of the corporation, "and the property and premises whatsoever, mentioned, specified, described or referred unto in the" first mortgage. *Held*, that the second mortgage, as against a subsequent attachment, conveyed engines and cars acquired by the corporation after the first and before the second mortgage.

The objection that one of the plaintiffs in an action brought by trustees had not accepted the trust at the date of the writ cannot first be taken at the argument before the full court upon the report of one of the judges.

The president of a railroad corporation, authorized by vote of the corporation to execute and deliver, and "do and perform all other acts and things necessary to give validity and effect to" a mortgage of the road, franchise and property of the corporation to trustees for the benefit of bondholders, executed, upon the eve of the failure of the corporation, a deed of surrender of the whole road and property to the trustees, who, upon the failure of the corporation, took possession of the road and property, and afterwards kept exclusive management and control thereof. *Held*, that the trustees thereby obtained and kept actual possession of the property, as against subsequent attaching creditors; although the laws of the State required not only delivery, but continuous and exclusive possession of the grantees, to perfect such a title; and although the trustees continued to employ in the management of the road the same persons who had been employed by the corporation; and although the mortgage provided that the trustees should permit the corporation to retain the exclusive use and possession of the property until some default in paying the principal or interest of the bonds, which had not yet occurred.

In an action for attaching property on mesne process against a third person, which remains in the plaintiffs' possession after the attachment and until judgment and execution, the measure of damages is the value of the property at the time of its being taken on execution.

Action of tort by Samuel Henshaw and William Raymond Lee, trustees under a second mortgage of the Rutland and Burlington Railroad, for the conversion of five locomotive engines, and the tenders and tools used about them, four passenger cars, and other chattels, formerly belonging to the railroad corporation and alleged to be the plaintiffs' property. Writ dated February 4th 1854. Trial at November term 1856 before

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Thomas, J., who reported the case for the consideration of the full court.

S. Bartlett & J. P. Putnam, for the plaintiffs.

R. Choate, B. R. Curtis & S. E. Sewall, for the defendants.

MERRICK, J. This suit is prosecuted to recover the value of the locomotive engines, tenders, passenger cars and other articles enumerated in the writ. It is agreed that all these articles were formerly owned by the Rutland and Burlington Railroad Company, a corporation having its charter from the legislature of the State of Vermont. Both of the parties to the present suit derive the right and title upon which they respectively rely from that company. The defendants having obtained an execution against them upon a judgment rendered in a court of competent jurisdiction in the State of Vermont, caused the locomotive engines and other articles now in controversy, the same having been previously attached on mesne process, to be seized and sold thereon in satisfaction of the same. But the plaintiffs contend that, prior to the time when the attachment in that suit was made, they had acquired a right to all this property, which could not lawfully be interfered with or disturbed by the defendants. The attachment in their suit against the railroad company was made on the 31st of January and the 1st of February 1854, and the instrument of conveyance under which the plaintiffs claimed to derive their title was executed on the 1st of August 1853. If therefore that instrument was of legal validity and did by its terms transfer and convey the property and chattels now in question to the plaintiffs, and if they thereupon did whatever was necessary by the laws of the State of Vermont, where the instrument was executed, and where the property which it purported to convey was situate, to perfect in them a good and complete title as against all subsequent purchasers and attaching creditors, it is obvious that the plaintiffs are entitled to prevail in this action; because, being prior in point of time, their right is paramount to any which could be exercised by the defendants under their writ of execution.

By the laws of the State of Vermont "every railroad corporation shall have power to issue their notes or bonds for the pur-

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pose of building or furnishing their roads, or paying any debts outstanding for building or furnishing the same, bearing such a rate of interest, not exceeding seven per cent., and secured in such manner, as they may deem expedient." Compiled Sts. c. 194, § 13. At a meeting of the stockholders of the Rutland and Burlington Railroad Corporation, held on the 8th of June 1853, authority was given, by resolutions duly adopted, to the directors of the company to issue bonds, obligations or promissory notes, at their discretion, to an amount not exceeding twelve hundred thousand dollars, bearing interest at a rate not exceeding three and one half per cent. semiannually, to be applied in payment of debts contracted in building and furnishing their road. And in like manner further authority was given them to secure the payment of all the bonds, notes and obligations which should thus be issued, by executing to such persons as they should select as trustees, in trust for the use and benefit of the holders of those bonds, notes and obligations, "an additional or second mortgage of the road, franchise and property of every description, including cars, engines, station houses and wharves." This was, by the terms of the vote, to be subject to the first mortgage which had been made by the company, and to be made "as full and complete, with like reservations," as that mortgage. The president of the corporation was also authorized to execute, acknowledge and deliver the mortgage, and (which it may be material hereafter particularly to consider) "to do and perform all other acts and things necessary to give validity and effect to said conveyance."

In pursuance of the authority thus vested in the president and directors of the corporation, bonds to a large amount were issued, and the indenture of two parts bearing date the 1st of August 1853, reciting the votes by which these powers had been conferred, was duly executed by and between the corporation of the first part and Samuel Henshaw and Joshua Thomas Stevenson of the other part.

The counsel for the defendants were not, at the argument of this cause, disposed to deny, and we think they were perfectly right in admitting with candor that it could not fairly be denied,

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that it was the purpose of the legislature to enable railroad corporations to mortgage their franchises and property, even though the effects of such a mortgage would be, when foreclosed, to deprive the corporation of the necessary means to perform their corporate duties to the public. And no suggestion is made of any irregularity or of any want of due formality in the execution of the deed of indenture of the 1st of August, the object and purpose of which were to afford security for the payment of the bonds and obligations which the directors had issued and proposed to issue in pursuance of the resolutions adopted at the meeting of the stockholders.

The authority of the directors to cause to be executed the indenture of the 1st of August is thus proved; and that instrument having been in fact executed with all due formality, the first question which arises has relation to the particular articles of property it purports to convey. It is conceded by the plaintiffs that of the several articles enumerated in their writ, three of the locomotive engines and one of the cars were not owned by the railroad corporation when the first indenture of mortgage was executed; and the defendants therefore deny that these passed to the plaintiffs by the second indenture. This last mentioned instrument conveys to the persons therein named as trustees "all the lands, buildings, tenements, hereditaments, franchise, road, rights, easements, immunities and privileges whatsoever, and the property and premises whatsoever, mentioned, specified, described or referred unto in the indenture first before mentioned," that is, in what is termed the first mortgage deed. On recurring to that deed to which the description in the indenture of the 1st of August 1853 refers, it is seen that it purports and professes to convey not only the lands, franchise, and privileges of the corporation, but also "all the locomotive engines, cars, machinery, tools, implements, utensils and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use." Now it may be considered very certain, as matter of law, that this instrument did not and could not operate at all as an instrument of conveyance of personal property not then in existence or not

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then owned by the corporation. *Barnard* v. *Eaton*, 2 Cush. 294. *Codman* v. *Freeman*, 3 Cush. 306. But it may be considered equally certain, as matter of fact, that it was the intention of the corporation, or of those of its officers by whom the deed was executed, that it should have that effect and operation; and that after acquired personal property of the kind there mentioned should, equally with that then in existence and owned by the grantor, be thereby transferred to the grantee. Subsequently acquired personal property, such as locomotive engines and cars, is there very clearly and distinctly referred to. And by the indenture of the 1st of August 1853 the corporation convey, in direct terms, not only all the personal property "mentioned," but also all that which is "referred to" in the first indenture. When the circumstances under which the second indenture was made, and the objects and purposes of it are considered; that there was then outstanding a first mortgage to protect the creditors of the corporation in relation to any large sums of money in which they stood indebted; that the amount of the notes and bonds which were to be issued under the security of this second indenture might reach the sum of twelve hundred thousand dollars; it is obvious that the words of conveyance used in it were intended to cover all the available property which was, or which might be, in the possession of the corporation. As it purported to convey all locomotive engines and cars referred to in the former mortgage, and as that mortgage did in the most distinct manner refer to subsequently acquired property of this kind, we think that upon a true construction of its language, those three locomotive engines and one car acquired by the corporation after the execution of the first passed to the grantors under the second indenture.

But the defendants now object that whatever passed to the grantees under the indenture of the 1st of August, no action can be maintained by the present plaintiffs for the unlawful conversion by the defendants of any portion of the property thereby conveyed, because at the time of the alleged conversion Mr. Lee, though he had been duly appointed a trustee in the place of Mr. Stevenson before, did not actually accept and take upon him-

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self the trust until after, the attachment made by the defendants of the property in question on their writ against the railroad company. To this objection the plaintiffs reply, and we think their reply is a sufficient answer, that it is not open to them upon the report. No such question as that was reserved at the trial. The report expressly states that no objection was raised to the evidence offered by the plaintiffs, except those particularly specified; and the question which arises upon the objection now urged is neither an objection to evidence, nor is it anywhere to be found mentioned among those reserved for the consideration of the full court. It ought not therefore now to be allowed. It is easy to see that if the objection had been taken at the trial, it might have been readily disposed of by the introduction of evidence showing that in fact Mr. Lee accepted the trust at an earlier date than that mentioned in the written memorandum which is in the case. Or, if necessary, an amendment which would have obviated the objection might have been granted without affecting in the least degree the merits of the case. Without therefore determining whether any effect would or ought to have been given to this objection, if, upon the evidence reported, it was properly or in fact before us, it seems clear that, no such question being reserved or intended to be reserved in the report, it is matter upon which we are not called upon to pass, and of which the defendants cannot now avail themselves.

But the further question, whether under the indenture of the 1st of August 1853 the personal property which it purported to convey was actually delivered to the grantees and afterwards remained in their open, visible and exclusive possession, is more elaborately considered and discussed in the written arguments of the counsel than any other which arises upon the report of the case. But upon the facts there disclosed it does not seem difficult of solution. The authorities to which reference is made in those arguments, the citations of which need not here be repeated, show very conclusively that, by the laws of the State of Vermont, the conveyance of personal chattels by deed of mortgage, bill of sale, or any other instrument, to be held in trust

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by the vendee or grantee as security for the payment of a debt due to him, will not avail against a subsequent attachment thereof, unless he has previously thereto obtained a delivery of the chattels and has thenceforward been in the open, visible and exclusive possession of the same.* In conformity then to this rule, which must be regarded as absolute and inflexible, the burden of proof is upon the plaintiffs to establish the truth of this general proposition; that they did, before the attachment made by the defendants, obtain the possession of the personal property conveyed to them by the Rutland and Burlington Railroad Company, and did afterwards constantly remain in the open, visible and exclusive possession of it. And it appears to us that, upon a consideration of the facts stated in the report, that burden is fully sustained, and that the truth of this proposition is a just and necessary consequence from the evidence in the case.

The deed of indenture was executed on the 1st of August 1853. The grantees did not then take possession of any part of the mortgaged property, but the whole of it remained in the possession of the grantors until the 19th of November then next following. On that day the railroad company stopped payment; and since that time no business pertaining to the running of trains, the transportation of passengers or freight upon the road, or the care, custody and management of the engines, cars and other mortgaged property, has been transacted by any person in the employment or under the control or direction of the corporation or of any persons acting as their officers. Yet all this property was afterwards in constant use, and was employed by the persons who then had it in custody, just in the same manner as it had been before by the corporation, in the transportation of passengers and freight. But if this business was done in fact, and

* Upon this point the plaintiffs relied on *Kendall* v. *Samson*, 12 Verm. 515; *Hall* v. *Parsons*, 17 Verm. 271; *Coty* v. *Barnes*, 20 Verm. 78; *Stephenson* v. *Clark*, 20 Verm. 624; *Hutchins* v. *Gilchrist*, 23 Verm. 87, and cases cited; *Burrows* v. *Stebbins*, 26 Verm. 659; and the defendants, on *Tobias* v. *Francis*, 3 Verm. 425; *Woodward* v. *Gates*, 9 Verm. 358; *Sturgis* v. *Warren*, 11 Verm. 433; *Russell* v. *Fillmore*, 15 Verm. 130; *Skiff* v. *Solace*, 20 Verm. 279.

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none of it was done by the corporation, or by any of their officers, or by any persons under their direction — and this must be taken as an indisputable fact, since it may be said, without qualification, that it is shown to be so by all the evidence in the case — the inquiry necessarily arises by whom else was it done, and who had possession of the property. These inquiries it is not difficult to answer.

On the 16th of November 1853, Mr. Lee, as the president of the corporation, in pursuance of a vote of the directors at a meeting held by them on the same day, executed with Messrs. Henshaw and Stevenson, the grantees and trustees under the deed of indenture of the first of August, a further deed of indenture, whereby the mortgaged property was surrendered and yielded up to them, to be held solely for the uses and purposes for which it was conveyed. It is insisted by the counsel for the defendants, that this whole proceeding was unwarrantable and illegal; that the vote of the directors was invalid, because it was adopted at a meeting held at a place beyond the jurisdiction of the state under which the corporation held their charter; and that the act proposed thereby to be done was beyond their power or right to authorize. But whether this should so be determined was a matter of law or not, it is indisputable in point of fact, that the deed of surrender, as it is called, was then executed by the parties; and that three days afterwards, to wit, on the 19th of November, Messrs. Henshaw and Stevenson proceeded to take possession of all the mortgaged property of every description. They appointed an agent to act for them in that behalf; and he went, under their special and written directions, to every place where any of this property was then situate or to be found, and took possession of it for them, and gave notice thereof in writing to every individual who had charge of any part of it. From that time forward the trustees had the exclusive control in the management of all the business over the road The persons performing every species of labor upon or with it were in their employment, hired and paid by them, and subject to their control. This state of things remained unchanged until after the defendants made their attachment of the property now

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in controversy. And thus it appears that the corporation were not then in possession of the property at all, but that the grantees had the sole, open, visible and exclusive possession of it under a claim of right, which claim was acquiesced in as indisputable by the grantors.

This meets the requirements of the law. The mortgaged property was in fact delivered to the mortgagees; they retained the possession of it, and applied it to the uses for which they were to hold it in trust. The objection that the agents and servants, whom they employed to take care of, manage and use the property, were the same persons who had been for the like purposes employed by the corporation, before the surrender and delivery of it, is wholly immaterial, and can in no way affect the rights of the parties. The trustees were obliged to employ suitable and proper persons to keep, take care and manage the machinery, cars and every other species of property, for which, coming into their possession, they were to be and remain accountable. For this purpose they had a right to employ whomsoever they pleased. If they did in fact employ those who had before been in the service of the company, they were not thereby any less in the actual possession of the property, than if they had sought for and procured the labor and services of other individuals. It is said that by this course of proceeding the public were not as effectually notified of the change of possession as they might have been. This is perhaps to some extent true, but less we think than upon first view might be supposed. How have the public any effectual means of determining at any particular time in whose employment are the persons seen in the performance of labor or service upon a railroad, except by the institution of inquiries in the proper quarter; by seeking information directly from one or the other of the parties to the contract? If that had been done by anybody after the change which took place under the direction of the trustees, it would at once and immediately have been known, for it is not pretended that there was any designed, intentional or actual concealment. The only ground upon which the defendants insist that there was no change of possession is, that the publicity of it by the adoption

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of means other than those which were resorted to might have been greater or more distinctly diffused. But this extended publicity is no requisite of the law. It is enough, and all that is necessary to protect his rights against subsequent purchasers or attaching creditors, that the mortgagee has in fact obtained possession of the mortgaged property, and has afterward continued to be in the open, visible and exclusive possession of it for the uses and purposes for which it was transferred to him.

By the vote of the stockholders of the Rutland and Burlington Railroad Company at their meeting held on the 8th of May, 1853, in addition to the other powers conferred on the officers of the corporation respecting the conveyance of its property by a second mortgage deed, the president was expressly authorized to do and perform all acts and things necessary to give validity and effect to the conveyance which the directors were empowered to cause to be executed. The great object and purpose of the corporation in that conveyance cannot, either in consideration of the terms in which it is expressed, or of the resolutions under which its officers were empowered to act, be mistaken. It was to give security to the creditors of the grantor, and ample power was conferred on the officers of the corporation to do, in their respective stations, whatever was essential to accomplish that object. It is true that the grantees were to hold the property conveyed to them in trust, among other things, for the use of the grantors until there should be a failure to pay some portion of the principal or interest of the debt to recover which the property conveyed was pledged. But special authority had been given to the president to make this conveyance to the trustees effectual to the security of the creditors, by doing all acts requisite for that purpose; and as this could be done only by surrendering and delivering up to the grantees possession of the mortgaged property, he had a right, and it may be said that it was his duty, to do that act. The facts proved in the case show that in this particular he conducted himself in good faith. The corporation were on the eve of failure; the creditors intended to be protected by the mortgage could be

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made secure only by the exercise of the authority with which he had been invested; and he therefore rightfully and properly gave up the possession of the mortgaged property to the trustees. It is immaterial how this was done; it is sufficient that it was done in fact. He having in himself, in his own office, under the specific vote of the corporation, sufficient authority to deliver the property as one of the acts necessary to give effect to the conveyance, and having actually put the grantees in possession of it, it is unnecessary to inquire whether the directors proceeded with regularity, or transcended their authority in the vote which they adopted relative to the deed of surrender. Irrespectively of all their proceedings, the trustees had acquired by the act of the president a perfect title to the property against subsequent attaching creditors. And this is clearly so, notwithstanding the provision in the indenture that the trustees shall hold the conveyed property in trust to suffer and permit the grantors to retain the exclusive possession, use, management and control of it until the occurrence of a certain specified default in the payment of some part of the interest or principal of the several debts for the due security of which it was made and executed. For there are other trusts also created by it, the first and leading one of which is, that all the property therein mentioned shall be held and devoted to the security and ultimate payment of these debts. To execute each and all the trusts imposed upon the grantees by their acceptance of the conveyance made to them by the corporation, it was indispensable that they should have, as has already been shown, the actual, open and visible possession of all the personal property conveyed to them; otherwise, the particular trust for the benefit of creditors might be wholly defeated by the interference of subsequent purchasers or attaching creditors. To prevent such consequences and to secure an appropriation of the property, so that it should not be diverted from a faithful application thereof in the execution of the several trusts created by the provisions of the indenture, it was the undoubted right of the grantees to take the property conveyed to them into their own sole and exclusive custody. Whenever the provisions of a contract create an obli-

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gation against one of the parties to it in reference to specified property of which it is the subject, he is by necessary implication authorized to do all acts which are absolutely essential to the strict performance of his duty concerning it. If there be conflicting provisions, it is reasonable that those of minor importance should yield to the great and paramount purpose of the parties and to their object and design in its execution. And upon this principle it is apparent that the trustees ought to have taken possession as they did of the mortgaged property. The chief end for which the indenture was executed was manifestly to create a fixed security in behalf of certain distinctly designated creditors of the corporation, and that end could be effectually accomplished only by the course which the trustees pursued. Their possession of the property was therefore a right upon which they might lawfully insist. But aside from this conclusion, it is to be considered, in a controversy between the present parties, that the particular trust assumed by the trustees, to suffer and allow the grantors to remain until the occurrence of a specified contingency in possession of the mortgaged property, was a provision solely and exclusively for their benefit, and of which they only were entitled to take advantage. The plaintiffs have no cause of complaint when the terms of a provision, not made for them or on their account, but wholly for the use or advantage of the corporation, are not strictly observed, if the latter are satisfied and acquiesce in the omission. It will be in sufficient season to determine what are the rights of the *cestuis que trust*, and whether they have been violated, when the party in interest shall interpose objections to the proceedings of the trustees, or seek relief for any injury alleged to have been sustained.

Other questions have been adverted to in the arguments, upon which we have no occasion, in the determination of those upon which the rights of the parties in this case depend, to express any opinion. If in anything the railroad company, or their officers, have failed to perform in behalf of the public the duties required of them by law, proper remedies may no doubt be found; but nothing of that kind is shown by which the questions at issue in this action are affected.

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The plaintiffs being, as has been shown, entitled to recover, it only remains to determine the principle upon which their damages for the unlawful conversion of the property taken by the defendants is to be ascertained. The existence of the first mortgage and the rights of the mortgagees under it present no impediment to the plaintiffs' recovery, because the latter were in the actual possession, and there is no evidence to show that the former ever took any possession whatever of the property. Of course they can prefer no claim to it against the subsequent purchasers. The rule of damages is therefore to be prescribed without regard to any supposed claim on their part. The general principle is, that in actions of trover and trespass for the unlawful conversion of personal property, the owner shall recover the value of it as it was at the time of the first wrongful taking, with interest afterwards from that date. If this rule were here to be applied, the plaintiffs would be entitled to claim the value of the property as it was on the day of the attachment thereof on mesne process, with interest afterwards. But under the particular circumstances of the present case we think that rule is inapplicable; and that it would be unjust to allow it to be enforced. The plaintiffs did in fact have the full and entire use of the engines, cars and other articles until they were seized by the sheriff on the execution. They are therefore to recover whatever the value of the property shall be ascertained to have been on that day, with interest thereon until the time of entering up the judgment. If the amount for which judgment, according to this rule, is to be entered is not agreed upon by the parties, the cause must be sent to an assessor to ascertain and report it. *Judgment for the plaintiffs.*

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HARRISON GRAY OTIS *vs.* FREDERICK O. PRINCE & others, trustees.

A testator devised real estate to his grandson in fee; and by a codicil directed the estate to be held by trustees, "in trust to pay over to him quarterly the net income of said estate, so long as he shall remain unmarried; and, in the event of his marriage or his dying unmarried, to convey the estate to his heirs." *Held*, that the restraint upon marriage was against the policy of the law, and the gift over was void.

ACTION OF CONTRACT against the trustees under the will of Harrison Gray Otis, the plaintiff's grandfather, to recover a quarter's income of real estate devised to the plaintiff in fee by that will, but as to which a codicil contained the following provision:

"I so far modify my devise in said will to my grandson Harrison Gray Otis, Jr., that I direct the real estate, therein devised for his benefit, to be held in trust by my said three sons, the survivors or survivor of them, and his heirs, in trust, to pay over to him quarterly the net income of said estate, deducting all expenses for repairs and insurance, so long as he shall remain unmarried; and in the event of his marriage or dying unmarried, to convey the same to his legal heirs."

The plaintiff was afterwards legally married; and the trustees refused to pay the subsequent income to him. The parties stated the above case to the court.

E. F. Head, for the plaintiff, argued in writing.

F. O. Prince, for the defendants, submitted the case without argument.

THOMAS, J. By the original will the estate is given to the plaintiff in fee simple. The codicil devises the estate in trust to pay the net income to the plaintiff so long as he shall remain unmarried, and, in the event of his marriage or dying unmarried, to convey it to his legal heirs.

The condition is subsequent, and the restraint upon the marriage of the grandson without limitation as to time or person. It is therefore clearly against the policy of the law, and void, unless there is a valid gift over. *Parsons* v. *Winslow*

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6 Mass. 169. *Lloyd* v. *Branton*, 3 Meriv. 108. *Morley* v. *Rennoldson*, 2 Hare, 570. 1 Jarman on Wills, 843. 1 Story on Eq. §§ 280, 288.

The trustees upon the marriage are to convey the legal estate to the heirs of the plaintiff. It is very familiar law that a devise to the heirs of one living is void. *Nemo est hæres viventis.* Shep. Touchst. 415. 6 Cruise Dig. tit. 38, *c.* 10, § 37.

There are exceptions to the rule, as well settled perhaps as the rule itself; as where, in the case of a devise, it is plain from the whole will that the testator intended to use the words "heirs" or "legal heirs" as words of description or purchase. Upon the examination of the will of Mr. Otis we find no manifestation of such purpose. Assuming that there was no inadvertency or mistake in the drafting of this clause, there are no clear indications that the words "legal heirs" were to be used in any other than their ordinary legal sense. The result is that the equitable devise over is void. *Heard* v. *Horton*, 1 Denio, 165.

Judgment for the plaintiff.

WHITTENTON MILLS *vs.* GEORGE B. UPTON & others.

A manufacturing corporation under the laws of this commonwealth cannot form a partnership with an individual.

A manufacturing corporation and an individual who have actually made a contract of partnership, and, either with or without the assent of all the stockholders of the corporation, acted and held themselves out to third persons as copartners for many years, and contracted debts as such, cannot, upon the petition of such individual, be put into insolvency as a partnership, under *Sts.* 1838, *c.* 163, and 1851, *c.* 327; and proceedings in insolvency so instituted will be suspended by this court upon the application of the corporation.

PETITION by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, of Taunton in the county of Bristol, as partners, upon Mason's petition; to restrain the assignees appointed under those proceedings from further interfering with their estate; and

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to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations. The facts of the case, as appearing by the report of a special master in chancery, were as follows:

The Whittenton Mills were incorporated by *St.* 1836, *c.* 19. for the purpose of manufacturing cotton goods at Taunton; and, at the time of organizing under their charter, adopted by-laws, extracts from which are copied in the margin.*

The Taunton Manufacturing Company, a corporation authorized by their charter (*St.* 1822, *c.* 44) to manufacture iron, copper, cotton and wool, failed in 1836, and their property was divided among their creditors. The Whittenton Mill, one of their establishments, was taken by certain persons who had been stockholders in the Taunton Manufacturing Company and became stockholders in the Whittenton Mills corporation.

Leach & Keith and Crocker & Richmond, occupying a machine shop, foundry, tools and machinery which had previously belonged to the Taunton Manufacturing Company,

* The officers of the corporation shall be a treasurer, agent, clerk and three directors. The agents, under the authority of the directors, shall superintend and manage all the active business of the company — the erection of buildings, construction of machinery, purchasing stock, manufacturing and selling goods, and receiving and paying debts; and they shall have power to make all such contracts as may be necessary for the purposes aforesaid, and to settle and adjust the same. The directors may call meetings of their board in such manner as they shall prescribe, and, at any such meeting, two shall constitute a quorum for the transaction of business. They shall have power to purchase mills and mill sites, and any real estate necessary or convenient for carrying on the business of the corporation. They shall have power to appoint agents, and remove them from office; to appoint a clerk or treasurer *pro tempore* in case of vacancy or absence; to appoint, or authorize the agent to appoint, all other needful officers under him; to fix salaries and compensations for all the officers and agents employed by the company; to direct the number and extent of buildings to be erected, the extent and kind of machinery to be constructed or purchased, and the extent and kind of manufactures to be carried on; to declare dividends; to call meetings of the corporation; to instruct the agents and other officers, and regulate and control their doings, and exercise a general superintendence and control over all the officers of the corporation. Meetings of the directors may be holden at any time and place for the transaction of any business when all the board are present without any previous notice.

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furnished the greater part of the machinery required for the Whittenton Mill from 1836 until 1842, when they failed, and their foundry, machine shop, tools, machinery and stock passed into the hands of officers of the law for sale and distribution among their creditors, and the tools, machinery and stock were purchased and the foundry and machine shop hired by Mason.

On the 28th of May 1842 the Whittenton Mills and Mason made an agreement in writing, that the corporation should advance to him the money necessary to pay for said tools, machinery and stock, and for the rent of the shop and foundry, and for the stock and labor which might be required in carrying them on, and be paid interest on the advances; and that, after paying a certain annual salary to Mason, the profits on patents then held or afterwards obtained by him, and all other profits derived from the manufacture of machinery or other work of the machine shop, should be equally divided between the parties, for five years. On the 1st of June 1845 the parties further agreed in writing that their joint business should be done and their joint property held in the name of William Mason & Company; and the shops hired by them and their stock of tools and machinery being insufficient, that land should be purchased, buildings erected and machinery and tools purchased or constructed forthwith to supply the deficiency; that Mason, besides an annual salary, should receive a certain sum on each spindle made by the parties under his patents, or sold to others; that the firm and their successors should have the right to use, without charge, all inventions and improvements in machinery made by Mason during the continuance of the agreement; that interest should be allowed to each party on all sums furnished for the use of the partnership; that the accounts should be stated annually, and be at all times open to the examination of the parties; that the profits, after deducting the allowance to Mason, should be equally divided between him and the Whittenton Mills; and that the agreement should continue in force for seven years from its date, unless sooner cancelled by mutual consent. And it was afterwards by agreement in writing extended for three years more.

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It was a great convenience for the Whittenton Mills to have the control of a foundry and machine shop, situated, as this foundry and shop were, within two miles of their factory, and to have the right to use the patterns in the shop, and the patents of Mason. The officers of the corporation made these agreements with the sole object of realising profits from the manufacture and sale of machinery, and at the time of executing the agreement of 1842 the Whittenton Mill was in full operation and was supplied with all the machinery required.

Under and in pursuance of these agreements, the firm of William Mason & Company, composed of Mason and the Whittenton Mills, carried on a very extensive business, (averaging $175,000 a year, and amounting in one year to $350,000,) confined to the manufacturing of machinery for cotton mills till 1852, when they built one locomotive engine. From this time, the manufacture of locomotive engines received an increasing share of their attention till their insolvency in 1857, when it constituted about one half of their business.

During the period of the partnership, the greater part of the machinery required by the Whittenton Mills was manufactured and sold to them by William Mason & Company. In the purchase and sale of this machinery the parties dealt with one another as strangers. Mason & Company also made repairs upon the machinery of the Whittenton Mills to the amount of $4000 during that time. And Mason & Company manufactured and sold to other persons and corporations large quantities of tools and machinery; and stated and rendered to the Whittenton Mills, as partners, annual accounts of the copartnership business, which resulted every year until 1852 in large profits, half of which, according to the terms of said agreements, was paid over or credited annually to the Whittenton Mills, and was by that corporation distributed, with their other profits, among their stockholders. Since 1852 the firm have been doing a losing business.

The capital stock of the corporation was divided into two hundred shares, the par value of which was five hundred dollars. The nature of the business in which Mason & Company were

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engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders, except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders, and who never attended a meeting of the corporation, but was a relative of a majority of the officers and of the stockholders, and with two of them was in the habit of consulting on his business affairs, and greatly relied on their judgment.

At and for some time before the insolvency aforesaid, William Mason & Company were employed in making machinery, which they had contracted to furnish to the Whittenton Mills, to the value of $35,000. The materials had all been procured, and the work was about three quarters done. It was generally known, in the shop of Mason & Company, and in the town of Taunton, and to many of the persons who furnished the materials and performed the labor on this machinery, that it was building for the Whittenton Mills. And debts for such materials and labor, to the amount of $4000, have been proved against the estate of Mason & Company.

Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required, and advanced to Mason & Company all the money to pay for the machinery, stock and tools originally purchased; and afterwards, from time to time, made further advances to pay the accruing rents, and for the stock and labor, as well as for the land purchased, and the tools and machinery required in carrying on the copartnership business, and were credited with these sums, and with interest thereon, in the annual accounts stated and rendered by Mason & Company. The advances were made with the expectation that they would be reimbursed out of the profits. The lands were all conveyed to William Mason and his heirs, but were purchased for copartnership purposes, and the purchase money was charged in the copartnership account.

The general agent of the corporation, (who was also their treasurer for a portion of the time,) and Mason, represented to

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third persons, with whom the partnership was dealing, that the corporation was a member of the partnership. Two of the directors testified that they never heard a doubt suggested that this partnership was a valid one till said insolvency proceedings were commenced; and there was no evidence that its validity was ever questioned until that time, by any person. One person, acting under a power of attorney, executed by Mason, and by the Whittenton Mills through their general agent and with the knowledge of their clerk, on the 12th of January 1857, purporting to authorize him to use their partnership name "in signing and making checks and drafts and receipts, and indorsing drafts, checks, bills receivable, and bills of exchange," represented to those with whom he was negotiating for money and supplies for the shop that the Whittenton Mills was a member of the partnership, and upon the faith of such representations obtained money and materials to a large amount.

The Boston Manufacturing Company, incorporated in 1813, (*St.* 1812, *c.* 92,) "for the purpose of manufacturing cotton, woollen and linen goods," erected at Waltham the first power loom mill in this country; and have a machine shop, in which they made the machinery for their own mill and for the two cotton mills of the Merrimack Company, the first erected in Lowell; and have also made machinery, in large quantities, for cotton mills in Baltimore, Lowell and other places. The Elliot Manufacturing Company, incorporated in 1823, (*St.* 1823, *c.* 11,) "for the purpose of manufacturing cotton goods," furnished from their shop the machinery for one of the mills in Nashua, N. H. Cotton manufacturing companies generally have, connected with their mills, machine shops, or "repair shops," as they are called; and it is customary for such companies, when they have a good mechanic, and the patterns for a valuable machine, to furnish such machines to other factories.

This case was argued before all the judges on the 16th of June.

S. Bartlett & B. R. Curtis, for the petitioners. 1. A manufacturing corporation, created by a law of this state to carry on business therein, pursuant to the Rev. Sts. *cc.* 38, 44, cannot

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enter into a general copartnership with either a natural person or another corporation, even for the prosecution of the same business for which it was chartered. The powers of a corporation are only those expressly granted, and those implied, because needful, or, perhaps, usual and customary, for the ends which the corporation was created to attain. *Salem Milldam* v. *Ropes*, 6 Pick. 32. *Beaty* v. *Knowles*, 4 Pet. 166. Angell & Ames on Corp. §§ 229, 239, 256. The power to form a general copartnership is neither expressly granted, nor needful to transact the business of manufacturing.

The entire legislation of the State for the regulation of manufacturing corporations proceeds upon the assumption that each corporation will conduct its own several affairs separately, by means of its own duly appointed officers and agents, acting in the name and behalf of the corporation; and its interests and affairs cannot be committed to a partnership, and conducted under the rules and principles which govern partnership business and liability, without violating the public policy of the State, exhibited by its legislation, and removing the safeguards erected for the security of those who may become creditors of the corporation. Rev. Sts. *c.* 38, §§ 1, 2, 22, 25. In a partnership, the individual partner, (in this case Mason,) might do anything, within the scope of the business, not only without the concurrence of the directors, but against their will.

2. If this manufacturing corporation had power to enter into a contract of copartnership, it could not make this contract for the prosecution of a business foreign to the only purpose for which it was created, which was "for the purpose of manufacturing cotton goods in the town of Taunton, in the county of Bristol; and for this purpose" only it was to "have all the powers and privileges, and be subject to all the duties, restrictions and liabilities set forth in the" Rev. Sts. *cc.* 38, 44, and might hold real and personal estate to a certain amount. *St.* 1836, *c.* 19. It could not take or hold real or personal estate, either jointly or severally, for an object foreign to that business *First Parish in Sutton* v. *Cole*, 3 Pick. 240.

Its charter binds its capital and credit solely to the purpose

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of making cotton cloth. This charter is one of the public laws of the State. Every person who deals with the corporation in its legitimate business has the right to assume that to be its only business; and the application of its capital and credit, through a partnership, to a distinct and different branch of business, is in direct contravention, not only of public policy, but of the express provisions of the public law of its creation. *Bagshaw* v. *Eastern Union Railway*, 2 Macn. & Gord. 389. *Beman* v. *Rufford*, 1 Sim. N. S. 550. *Colman* v. *Eastern Counties Railway*, 4 Railw. Cas. 513, and 10 Beav. 1. *Caledonian & Dumbartonshire Junction Railway* v. *Magistrates of Helensburgh*, 2 Macqueen, 391.

3. The assent of all the members of the corporation, if given, is unimportant. They could not enlarge the powers of the corporation, nor make that legal which was contrary to the express provisions of a public law. *East Anglian Railways* v. *Eastern Counties Railway*, 11 C. B. 775. *Macgregor* v. *Official Manager of Dover & Deal Railway*, 18 Ad. & El. N. R. 618.

4. No creditor of Mason & Company can charge the corporation as a partner by reason of his dealings with the so called firm. The charter being a public law, every creditor, assuming to trust the corporation, either jointly or severally, is bound to take notice of it and its legal consequences, and so had notice that the corporation could not be a partner in this firm. This corporation could not empower an agent to sign either of the contracts of partnership. The attempt to do so was void, not merely for want of power, (as a similar attempt of a *feme covert* at common law would be,) but also because a violation of express law. *East Anglian Railways* v. *Eastern Counties Railway*, *ubi supra*. *Macgregor* v. *Official Manager of Dover & Deal Railway*, *ubi supra*. *Shrewsbury & Birmingham Railway* v. *Northwestern Railway*, 6 H. L. Cas. 113, 137. *Root* v. *Godard*, 3 McLean, 102. *Berry* v. *Yates*, 24 Barb. 199. *Mechanics' Savings' Bank* v. *Meriden Agency*, 24 Conn. 159. *Pennsylvania, Delaware & Maryland Navigation* v. *Dandridge*, 8 Gill & Johns. 248. *Sumner* v. *Marey*, 3 Woodb. & Min. 112. Angell & Ames on Corp. §§ 229, 239. *A fortiori*, Mason himself, on whose peti-

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tion the corporation were decreed insolvent, could not allege and set up the partnership.

5. If there was a valid subsisting partnership between Mason and the corporation, the insolvent laws of the Commonwealth do not authorize a decree, making the corporation legally insolvent, upon the petition of Mason. The *St.* of 1838, *c.* 163, is confined to natural persons, and has no reference to the insolvency of bodies corporate; the *St.* of 1851, *c.* 327, is confined to corporations, and has no reference to the insolvency of natural persons. *Sargent* v. *Webster*, 13 Met. 503. *Cheshire Iron Works* v. *Gay*, 3 Gray, 531. It would have been strange if the *St.* of 1851 had made provision for the insolvency of a partnership consisting of a natural person and a body corporate or two bodies corporate; for, if it is legally possible for such a partnership to exist, under the laws of this state, it was a very remote possibility and unlikely to be anticipated and provided for. The *St.* of 1851 has not only studiously omitted all provisions concerning partnerships, but has made an express provision in § 12 that the surplus, if any, after paying the debts of the corporation, shall go back to the corporation; which is necessarily inconsistent with the rights of joint creditors, and clearly shows they were not provided for.

E. R. Hoar & H. Gray, Jr. for the assignees. 1. A corporation has the same power as a natural person to make all contracts not prohibited by law, and which are necessary or usual in transacting the business which it is authorized by law to transact. The power to make a contract of partnership is not a distinct corporate power, to be created or conferred only by a special grant; but, like the appointment of an agent — and each partner is, as between themselves, an agent of the other — is only one mode or instrumentality of effecting the lawful objects for which the corporate powers were given. A corporation therefore may form a contract of copartnership to effect any purpose which it may lawfully accomplish by other means, agencies or instrumentalities. Angell & Ames on Corp. §§ 95, 96, 271, 272. *Canal Bridge* v. *Gordon*, 1 Pick. 304, 307. *Peckham* v. *North Parish in Haverhill*, 16 Pick. 287. *Old Colony*

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Railroad v. *Evans*, 6 Gray, 38, 39. *Catskill Bank* v. *Gray*, 14 Barb. 479. *Catskill Bank* v. *Hooper*, 5 Gray, 584, 585. *Conkling* v. *Washington University*, 2 Maryland Ch. 508. *Shrewsbury & Birmingham Railway* v. *London & Northwestern Railway*, 17 Ad. & El. N. R. 663, 665, 2 Macn. & Gord. 353, and 6 H. L. Cas. 135. *Great Northern Railway* v. *South Yorkshire Railway & River Dun Co.* 9 Exch. 642.

This case falls within the principle upon which congress has been held to have the power to incorporate a bank, although no such power is expressly granted, and the Constitution declares that all powers not delegated are reserved. 1 Kent Com. (6th ed.) 249–254.

The Whittenton Mills are shown to have made and acted under agreements of copartnership with William Mason. "Trading corporations are affected, like private persons, with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally, by those legal and equitable considerations, which affect the rights of natural persons." *Melledge* v. *Boston Iron Co.* 5 Cush. 175.

2. The subject of those agreements was within the scope of the chartered powers. A corporation for the manufacture of cotton by machinery may make or repair, as well as purchase, the machinery which it has occasion to use. It may make this machinery in a machine shop which it owns or hires, either alone, or in connection with any other person or corporation. It may make this machinery, either by itself, or in conjunction with any other person or corporation, who desires and has lawful authority to engage in the manufacture of machinery. It is found, as matter of fact, to have been the custom of cotton manufacturing corporations, from the commencement of the cotton manufacture in this commonwealth, to manufacture machinery for their own use, and for sale in large amounts to others, without special authority by statute; and that the obtaining of machinery in this way was a great convenience and

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economy to the corporation in this case. *Ante*, 585, 587. The fact that the sole purpose of the officers who made these agreements on behalf of the corporation was to make money, cannot affect the validity of the partnership; because that was the object of all the business of the corporation; and because that object does not appear to have been disclosed to any parties with whom the partnership or the corporation transacted business.

Similar powers are lawfully exercised, and a like construction of the incidental and implied authority conferred by a charter is recognized, in analogous cases. A manufacturing corporation may own a water privilege, dam, warehouses, teams and carriages, weighing apparatus, a herd of cows to furnish manure for dyeing, fire engines, shares in an aqueduct, a reservoir and the like. Cannot it insure in a mutual insurance company, and thus incidentally engage in the business of insurance? Or keep a shop, as a convenient mode of paying its operatives, and allow other persons to purchase goods there? Or own a school-house, church, parsonage or hall for lectures or meetings? Or associate itself with other persons or corporations owning mill privileges on the same stream, in constructing a reservoir for their common benefit? And cannot a parish or religious society let rooms under its church for shops or schools, or its cellars for storage? *Chester Glass Co.* v. *Dewey*, 16 Mass. 102. *St.* 1814, *c.* 4. *Spaulding* v. *Lowell*, 23 Pick. 71. *Lowell Meeting-house* v. *Lowell*, 1 Met. 538. *The Banks* v. *Poitiaux*, 3 Rand. 136. In whom did the property purchased in the first instance for the partnership vest, if not in the firm?

3. The facts show that the nature of the business of the partnership and the manner of conducting it were known throughout to all the officers of the corporation; and to all the stockholders, except an owner of one fiftieth part of the stock; and he stood in such a relation to the others as to be bound by their knowledge, and had moreover ceased to be a stockholder three years before the insolvency. This assent of all the officers and stockholders of the corporation precludes any inquiry into the validity of the partnership, so far as concerns contracts already executed

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Canal Bridge v. *Gordon*, 1 Pick. 304. *Graham* v. *Birkenhead Lancashire & Cheshire Junction Railway*, 2 Macn. & Gord. 146. *Marsh* v. *Keating*, 2 Cl. & Fin. 289. *Fyooks* v. *Southwestern Railway*, 1 Sm. & Gif. 142, 164.

4. If the corporation, in making this contract of partnership, exceeded its chartered powers, such violation of the charter can only be alleged by the Commonwealth, in proceedings against it for a forfeiture of the charter; and the validity of the contract cannot be called in question, or the rights of innocent third persons resulting from it interfered with, by its creditors or debtors, and least of all by the corporation. *Chester Glass Co.* v. *Dewey*, 16 Mass. 102. *Silver Lake Bank* v. *North*, 4 Johns. Ch. 373. *Moss* v. *Rossie Lead Mining Co.* 5 Hill, 137. *State of Indiana* v. *Woram*, 6 Hill, 37. *Quincy Canal* v. *Newcomb*, 7 Met. 276. *White* v. *South Shore Railroad*, 6 Cush. 412. *Leazure* v. *Hillegas*, 7 S. & R. 313. *Baird* v. *Bank of Washington*, 11 S. & R. 418. *The Banks* v. *Poitiaux*, 3 Rand. 136.

If there was a copartnership valid to any extent, it cannot be objected to the claims of those who have dealt with it in good faith, that the corporation has, in some respects, exceeded its chartered powers. *Eastern Counties Railway* v. *Hawkes*, 5 H. L. Cas. 338, 350, 368, 381, 382, and 1 DeGex, Macn. & Gord. 737. *Doe* v. *Horne*, 3 Ad. & El. N. R. 766. *The Queen* v. *White*, 4 Ad. & El. N. R. 111, 112. *Horton* v. *Westminster Improvement Commissioners*, 7 Exch. 780. *Allegheny City* v. *McClurkan*, 14 Penn. State R. 81.

Most of the cases cited by the petitioners were either of refusals to enforce a contract in equity, not of active interference to set it aside; or they were cases of railroad corporations, which are public in their nature, and not like mere trading corporations. *Treadwell* v. *Salisbury Manuf. Co.* 7 Gray, 404.

5. A corporation, which has formed a lawful contract of copartnership, or one which is obligatory upon it to any extent, or as to any persons, may be brought under the operation of the insolvent laws as a partner, upon the petition of its copartner, in conformity with the provisions of St. 1838, *c.* 163, § 21. The legislation of Massachusetts concerning persons is to be taken

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to include corporations, whenever the same reasons will apply to them; and the purpose and effect of the *St.* of 1851, *c.* 327, were to follow out the policy of the *St.* of 1838, *c.* 163, and to extend the insolvent system of the Commonwealth, which had been previously limited to natural persons, to corporations, and thereby secure an equal distribution of all insolvent estates among their creditors. Rev. Sts. *c.* 2, § 6, *cl.* 13. *Dearborn* v. *Ames*, 8 Gray, 1. In *Cheshire Iron Works* v. *Gay*, 3 Gray, 531, there was a distinct remedy under the statutes, by application to this court. Neither of the statutes authorizes a creditor to initiate proceedings more extensive in their effect than either of his debtors could. If this petition of the Whittenton Mills can be sustained. there is no means by which the estate of this insolvent partnership can be brought under the operation of the insolvent laws of the Commonwealth. The effect would be to leave the insolvent system in this anomalous condition: Insolvent debtors are subject to it; insolvent partnerships are subject to it; insolvent corporations are subject to it; but an insolvent partnership, composed of an insolvent individual and an insolvent corporation, is beyond its reach.

Thomas, J. This is a petition to this court, sitting in equity, and as such having, by the *St.* of 1838, *c.* 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of entering into and forming such partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the *St.* of 1838, *c.* 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

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At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is, Can a manufacturing corporation in this commonwealth, incorporated since February 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the revised statutes, enter into a contract or society of copartnership?

This corporation was created in March 1836 as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges and made subject to all the duties, restrictions and liabilities set forth in the thirty-eighth and forty-fourth chapters of the revised statutes, passed on the fourth of November preceding, but not to take effect till the first of May eighteen hundred and thirty six. St. 1836, c. 19. This charter, with the provisions of the chapters referred to and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of c. 38 of the Rev. Sts. provides that the

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business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof and such other officers, agents and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by his acts is vested in one not a member of the corporation nor its officer or agent. Such are the third, fourth and fifth sections, providing how the president and directors, and other officers, agents and factors of the corporation shall be chosen. Such too is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law or to reduce it. §§ 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debts. § 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently based upon the ground that the exclusive power to contract debts is vested in such directors, and that they cannot be divested of it, and which is wholly in-

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consistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the St. of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, bu this only when four fifths of the stockholders shall, by vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered did not exist before the statute was passed.

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We are therefore all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said however by the respondents that if this be so, such violation of the charter can only be alleged by the Commonwealth upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insolvency upon the petition of Mason under the *St.* of 1838, *c.* 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson* v. *Paige*, 3 Gray, 239. There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the corporation is part of the public law. Rev. Sts. *c.* 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton

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Mills and Mason. Upon that only could the petition of Mason be sustained.

It is not necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co.* v. *Dewey*, 16 Mass. 94, *Quincy Canal* v. *Newcomb*, 7 Met. 276, and *White* v. *South Shore Railroad*, 6 Cush. 412, can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co.* v. *Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was, that the corporation was prohibited from trading. The court held, that the legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court however added, that the defendant could not refuse payment on this ground, but that the legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold, but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal* v. *Newcomb*, it was held, that, where a canal was opened and toll claimed and the defendant used the canal, he was liable to the payment of such toll and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White* v. *South Shore Railroad*, it was held, that the defendants were liable for damages in constructing their road through and across a mill pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said, that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the government and the petitioner.

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If the assent of all the stockholders were shown to the formation of the partnership — which is not the fact — it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, *c.* 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills under the firm of William Mason & Company were illegal and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

EDWARD BANGS *vs.* EZRA LINCOLN & another.

The individual liability of stockholders of officers of a manufacturing corporation for debts of the corporation, under the Rev. Sts. *c.* 38, and *St.* 1851, *c.* 315, cannot be proved against their estates in insolvency.

APPEAL from a decree of the court of insolvency, disallowing a claim offered for proof against the separate estates of Charles H. Mills, James K. Mills, Samuel A. Eliot and Edmund Dwight, of which the defendants were assignees. The case was submitted to the judgment of the court upon the following facts:

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The plaintiff's claim was for the amount of a bill of exchange, (which had been duly presented, and protested for non-payment,) drawn and indorsed by the Whittenton Mills, a manufacturing corporation duly organized under the *St.* of 1836, *c.* 57, subject to the provisions of the Rev. Sts. *cc.* 38, 44, and in which all said insolvents were and long had been stockholders in different amounts, and all but Dwight officers.

The capital stock of the corporation was duly paid in, but no certificate thereof was made and recorded as required by the Rev. Sts. *c.* 38, § 17; nor any annual statement of the amounts of assessments voted and paid in, and of all existing debts, as required by § 22; nor any notice ever given by either of said insolvents to the stockholders of the excess of the debts of the corporation beyond their capital, and of his absence when such debts were contracted, or of his objection thereto, pursuant to § 25.

The plaintiff on the 15th of December 1857 commenced two actions to recover the amount of this bill of exchange; one of contract against said corporation, in which said insolvents were summoned as stockholders; and the other of tort against them as officers of the corporation; in both of which the writs were served by attachment of real estate of the insolvents; and which are still pending. The first publication of notice of the issuing of a warrant in insolvency was on the 11th of January 1858.

B. R. Curtis & E. Bangs, for the plaintiff. By *St.* 1838, *c.* 163, § 3, "all debts due and payable from" an insolvent debtor "at the time of the first publication of notice of issuing the warrant may be proved and allowed against his estate."

1. Upon the facts stated the insolvents, as stockholders of the Whittenton Mills, were jointly and severally liable for all the debts of the company. Rev. Sts. *c.* 38, §§ 16, 22. This obligation imposed by law upon the stockholders is a debt. 3 Bl. Com. 158. *Bullard* v. *Bell*, 1 Mason, 298. *Bordman* v. *Osborn*, 23 Pick. 295. *Gray* v. *Bennett*, 3 Met. 522. *Harger* v. *McCullough*, 2 Denio, 123.

The *St.* of 1808, *c.* 65, § 6, simply allowed an execution against the corporation to be levied upon the individual stock-

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holders, without charging upon them any liability as for a debt; and was therefore held not to create a debt which could be proved against their estates in insolvency, either in their lifetime or after their death. *Kelton* v. *Phillips*, 3 Met. 61. *Ripley* v. *Sampson*, 10 Pick. 372. *Gray* v. *Coffin*, 9 Cush. 205, 206.

But the Rev. Sts. *c.* 38, § 16, like the *St.* of 1821, *c.* 38, expressly declare a liability of the stockholders to pay the debts of the corporation, without prescribing the remedy; and a new remedy was given by *St.* of 1838, *c.* 163, § 3 — by proof against the estate of the debtor — applicable to a different state of things from the remedies provided by the Rev. Sts. *c.* 38, and the *St.* of 1851, *c.* 315, and not affected thereby. In *Knowlton* v. *Ackley*, 8 Cush. 93, it was only decided, that particular remedies having been prescribed by statute, no other could be pursued.

Where a specific sum of money is absolutely due from the insolvent, it is a debt, within the meaning of this statute; and it is not material how or why it became due, nor by what form of action *in personam* the remedy must have been sought if insolvency had not intervened. *Ex parte Lingood*, 1 Atk. 240. *Marson* v. *Barber*, Gow R. 17. *Ex parte Harding*, 5 De Gex, Macn. & Gord. 367. *Langford* v. *Ellis*, 14 East, 202, note. *Ex parte Charles*, 16 Ves. 256, and 14 East, 198. 1 Eden B. L. (3d ed.) 132. *Utterson* v. *Vernon*, 3 T. R. 548, 549. *Chapple's case*, 5 De Gex & Sm. 400. Wordsworth on Joint Stock Companies, 8–11. *Ex parte Wood*, 1 Mont., Deac. & De Gex, 92. *Ex parte Marston*, Mont. & Chit. 576. *Twiss* v. *Massey*, 1 Atk. 67.

The bill in equity, provided by the Rev. Sts. *c.* 38, § 21, is a direct remedy to enforce a legal title, to recover a precise sum of money due, and must allege the same facts as an action of debt, which would at common law have been the appropriate remedy. The *St.* of 1851, *c.* 315, does not take away this remedy, but only regulates the alternative remedy of a levy of execution. Even if it is necessary to recover judgment against the corporation before bringing a bill in equity against the stockholders, the liability of the stockholders is not less a debt. *Harger* v. *McCullough*, and *Bullard* v. *Bell*, above cited. *In re Murphy*, 1 Sch. & Lef. 44. Indeed, the *St.* of 1853, *c.* 371, § 1, gave an action of contract in such a case.

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2. All the insolvents except Dwight, being officers of the corporation, were, upon the facts stated, jointly and severally liable to the plaintiff for the amount of his claim. Rev. Sts. *c.* 38, § 19.

This liability is a debt, and having been absolutely due and payable before the first publication, is provable in insolvency against their separate estates. The nature of the liability is not affected by the remedy indicated; but if it were, the form of action indicated by the statute, and those sanctioned by the courts for enforcing similar liabilities, show that such liabilities are regarded by the law as debts. Rev. Sts. *c.* 38, § 29. *St.* 1829, *c.* 53, § 11. *Salem* v. *Andover*, 3 Mass. 436. *Bath* v. *Freeport*, 5 Mass. 325. *Bullard* v. *Bell*, 1 Mason, 243. *Porter* v. *Sayward*, 7 Mass. 377. *Whitehead* v. *Varnum*, 14 Pick. 523. *Simonson* v. *Spencer*, 15 Wend. 548. *Pledal* v. *Hundred de Thisleworth*, Sid. 263. 1 Chit. Pl. (5th ed.) 123. 2 Leigh's N. P. 710. 2 Inst. 650. It is neither qualified, contingent, nor unliquidated; but complete, absolute, and ascertainable as to amount without the intervention of a jury.

3. The policy and intent of the insolvent law are the discharge of the honest debtor, who has surrendered all his property, from all his liabilities, except such as from their nature cannot be determined and ascertained by the machinery proper to a court of insolvency; and the equal distribution of his property among all his creditors. The policy and intent of the statute imposing the liability on which this claim is founded are to provide the creditor of the corporation with an additional security. *Stedman* v. *Eveleth*, 6 Met. 120. *Bordman* v. *Osborn*, 23 Pick. 295. To exclude this claim from proof would be to take away that security at the moment when it is most needed, and would contravene the policy, not only of the statute imposing the liability, but also of the insolvent law. It would be inequitable not to allow the creditor to prove his claim under that insolvent law, the provisions of which have dissolved the attachment by which his claim was secured and would have been satisfied. Whenever two or more persons are liable for the same debt otherwise than as partners, the creditor may prove against the estates of each. *Weston, appellant*, 12 Met. 1.

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The remedy given by the Rev. Sts. c. 38, § 33, to any officer who shall pay any debt of the corporation will pass to his assignee in insolvency by the assignment. St. of 1838, c. 163, § 5.

A. H. Fiske & E. R. Hoar, for the defendants.

Bigelow, J. The claim of the plaintiff, which he seeks to prove against the separate estates of the insolvents in the hands of the defendants as assignees, is a debt due from a manufacturing corporation of which all the insolvents were stockholders and most of them officers. To entitle him to make such proof, it is necessary that he should make it appear that it was a debt due and payable from each of them at the time of the first publication of the notice of the issuing of the warrant against their separate estates; or a debt then absolutely due, although not payable till afterwards. If it cannot be brought within either branch of this description of debts, then it is clear that it cannot be included within the enumeration of other claims which are provable against the estates of insolvent debtors; and that it must fall within the provisions of St. 1838, c. 163, § 3, which excludes all other claims not therein specified from proof.

The case therefore raises the question, whether the liability to which the officers and members of manufacturing corporations are in certain cases made subject by the Rev. Sts. c. 38, in connection with St. 1851, c. 315, can in any just or proper sense be deemed the separate debt of each officer or stockholder.

Looking first at the provisions of these statutes, so far as they are applicable to stockholders, it is very clear that the liability which they create does not make the debts of the corporation the direct, separate and private debts of each stockholder. It is true that the liability is declared in very broad and general terms. The provision is that "the members shall be jointly and severally liable for all debts and contracts made by such company." But how liable? Not to an action in favor of the creditor against each or all of them as upon a debt for which they are jointly and severally liable. Such an action could not be maintained. *Knowlton* v. *Ackley*, 8 Cush. 97. To ascertain the nature of the liability, it is necessary to look at the means by which it can be enforced. These will indicate the

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nature of the right which it was the intention of the legislature to create. By proceedings at law under *St.* 1851, *c.* 315, § 3, a stockholder can be held liable only after judgment and execution for the debt have been obtained against the corporation, and a demand has been made on them for the payment of the debt, which has been refused, and a failure to find the property of an officer of the company wherewith to satisfy the execution. *Thayer* v. *Union Tool Co.* 4 Gray, 75. *Denny* v. *Richardson*, 4 Gray, 274. Under these provisions it cannot be contended that the liability is direct, positive and absolute, as for a debt due from the stockholder. It is only limited, collateral, and contingent on the failure of the corporation and officers to pay it. How then can it be held to be a debt due from the insolvents, in the sense of the insolvent law? Taking the provisions of the Rev. Sts. *c.* 38, providing for the liability of individual stockholders for the debts of the corporation, in connection with those of *St.* 1851, *c.* 315, they are in substance very similar to those of *St.* 1808, *c.* 65, § 6, which was never held to have made the corporate debts to be due directly from the stockholders, but only to have created a special and limited liability. The case of *Kelton* v. *Phillips*, 3 Met. 61, in which it was held that a liability under that statute could not be proved as a debt against the estate of a stockholder in insolvency would seem to be quite decisive of the present case.

But it is urged very strenuously in behalf of the plaintiff, that although the remedy at law against the stockholder may be such as to show that his liability is indirect and contingent, yet by the Rev. Sts. *c.* 38, § 31, a direct remedy by a bill in equity is given for the enforcement of such a claim, and that under this provision the liability may be properly regarded as constituting an absolute debt of the stockholder. There are two sufficient answers to this suggestion. It is a misconstruction of this section, to assert that it gives a direct remedy against the stockholder as on a debt or charge for which he is personally liable. No bill can be maintained under it against the stockholder until after a judgment has been obtained against the corporation for the debt. The remedy by bill in equity under § 31 is given

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instead of that provided by the preceding section, that is, in lieu of a right to levy an execution, issued on a judgment rendered against the company, on the person or property of the individual stockholder. But it is not given in the place of the judgment against the corporation. As such judgment must be obtained before the creditor could have any remedy by means of a levy of execution on the person or property of the stockholder, so also he must obtain it before he can maintain his bill under § 31, which is only a substitute for such levy.* But the better and more decisive answer is, that the statute of 1851, already cited, essentially modifies the right of the creditor to maintain a bill in equity under Rev. Sts. *c.* 38, § 31. Equity must follow the law. The effect of the provisions of *St.* 1851, *c.* 315, is not merely to alter the remedy of a creditor against a stockholder, or the mode of enforcing the debt, but also essentially to change the nature and character of the liability. If it could have been held to be direct and absolute under the provisions of Rev. Sts. *c.* 38, it is clearly not so under the subsequent enactment. The alteration in the remedy involved a material modification in the right; or, in better phrase, the legislature adapted the remedy to enforce a right which was contingent and not absolute. It would be unreasonable, if not absurd, to suppose that the intention of the statute was that a stockholder should be more directly and absolutely liable for corporate debts in one mode of proceeding than in another; that a more rigid rule should be administered for the enforcement of such debts in equity than at law. We certainly should not adopt any such conclusion unless it was the unavoidable result of the interpretation of the language of the statute. But no such construction is necessary. The different provisions of the statutes are susceptible of a much more reasonable interpretation. Being *in pari materia*, the enactments are to be construed together as parts of one and the same legislative act. In this view it is clear that the right or liability is the same, whether it is sought to be enforced in law or in equity.

* See *Cambridge Water Works* v. *Somerville Dyeing & Bleaching Co.* 4 Allen, 239.

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The St. of 1851, c. 315, so far as it affects stockholders, is a repeal of and substitute for Rev. Sts. c. 38, § 30, which prescribed the remedy at law in favor of creditors against stockholders. The provision in § 31 is therefore to be read and construed in the same manner as if it was preceded by the provisions contained in St. 1851, c. 315. In this view, the remedy in equity against a stockholder is in lieu of that which is given by proceedings at law, that is, he may be held liable on a bill in equity after the creditor has failed to satisfy his judgment against the corporation by levying his execution upon the corporate property or upon that of the officers of the corporation. This interpretation is consistent with true canons of exposition, and harmonizes the different provisions of the statute. The result is that, both at law and in equity, the liability is only a qualified and limited one, and in no just sense a debt for which the stockholder is absolutely liable.

This conclusion, to which the construction of the statutes leads, is fortified by some considerations of a general nature. The proof of the debts of a corporation, for which stockholders are liable, against their separate estate in insolvency, as debts for which they were absolutely liable, would produce great confusion and embarrassment in the administration of the insolvent law, and be in some respects inconsistent with its manifest scope and purpose. The right of proof could not be confined to debts due from insolvent corporations. It would extend to all debts of every corporation, for which the insolvent might be liable under the statute, whether payable or not, whatever might be their amount, and without regard to the ultimate solvency of the corporation and their ability to pay their debts when they should fall due. If the proof were allowed, the assignees, in behalf of the estate, would have a remedy over against the corporation for the amount paid by them as a dividend thereon, or, if the corporation were unable to pay, then for contribution against the other stockholders. This might render it necessary to keep the insolvent estate open and unsettled for many years. No provision is made for set-off of debts due from the corporation to the insolvent, nor for marshalling assets in order to meet this class of

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debts. Creditors of the corporation could prove their debts against the estate, vote in the choice of assignees, decide the question of the right of the debtor to his discharge, and in effect control the whole proceedings, to the practical exclusion of those who were his immediate creditors. The debtor is required to make out and deliver to the messenger a schedule of his creditors and of their place of residence, with the sum due to each, as well as of the nature of the debt and the consideration thereof, and whether it is secured by mortgage, pledge or otherwise. How can that provision be complied with, if the debts of a corporation, for which the insolvent may be liable, are to be regarded as his debts provable against his estate? A stockholder cannot defend against a debt due from the corporation on the ground that it is not due, or that it has been paid, or that for other reasons no recovery should be had against the corporation. *Holyoke Bank* v. *Goodman Paper Manuf. Co.* 9 Cush. 576. Can the assignee, who represents the stockholders, resist the proof of such claim, and contest the debt in proceedings in the nature of a suit at law on an appeal? These and similar considerations seem to show that the liability of stockholders for the corporate debts was not intended to be included among the class of debts which could be proved in insolvency against the estate of an insolvent stockholder.

It is urged as one ground for allowing such claims to be proved, that, if they are excluded, an insolvent debtor may be left liable to a large amount of debts from which he cannot be discharged. No doubt this is true. But there are many claims from which no discharge can be obtained under proceedings in insolvency, such as contingent debts, executory covenants, guaranties and the like. Those debts only are discharged, which are provable against the estate. Whether they are provable cannot be determined by the inconveniences or hardships which may enure to a debtor by reason of his inability to procure a discharge from them.

Many of the considerations which have been suggested are applicable to the claim of the plaintiff to prove against the estates of the officers of the corporation. But this part of the

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case can be disposed of very briefly. If the right to make such proof is put on the provision of Rev. Sts. *c.* 38, §§ 19, 29, it cannot be supported, because the liability thereby created is not a debt, but a right of action in behalf of a creditor for neglect or omission to perform certain official duties. If it is put on the provision of *St.* 1851, *c.* 315, then it is a secondary liability only, by which the property of the officers is made subject to seizure on execution, if the judgment against the corporation is not first satisfied out of the corporate estate. *Decree affirmed.*

GEORGE L. MONTAGUE *vs.* FRANCIS B. HAYES & others.

L. and M. purchased real estate, and had it conveyed to L., who furnished the purchase money; and L. wrote to an attorney the following letter: "The agreement between M. and myself is simply this: We have purchased an estate" (describing it) "which has by mutual consent been conveyed to me, I having paid and secured the purchase money. Whatever disposition is made of the property, the profit and loss are to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect." L. afterwards, with M.'s assent, divided the estate into lots, and sold them, and died insolvent. *Held*, that the letter of L., having been acted on by the parties, was evidence of a trust or a partnership, and sufficient to satisfy the statute of frauds; that the lots sold vested in the purchasers discharged of any trust; but that any mortgages taken back by L. upon sales were part of the trust fund.

BILL IN EQUITY, filed on the 8th of July 1851, against Thomas J. Lobdell and William H. Montague, and after Lobdell's death continued by bill of revivor against his representatives. Hearing before *Bigelow*, J., who reserved for the consideration of the full court the following case:

In July 1844 William H. Montague, (whose rights the plaintiff afterwards acquired,) agreed with Thomas Motley, Jr. and wife, and Francis C. Head, to purchase from them an estate on Washington Street in Boston, for the sum of $12,000; but, not having funds enough for that purpose, applied to Lobdell to join with him in the purchase, and they two purchased the estate and had it conveyed to Lobdell in fee, and Lobdell paid $3000 therefor, and gave his promissory notes secured by

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mortgage of the premises for the remaining $9000. At the time of the purchase, it was agreed between said Montague and Lobdell, that, whatever disposition should be made of the estate, the profit and loss should be divided between them, deducting interest, and that Sidney Bartlett, Esq., should make such papers as might be necessary to carry this agreement into effect; and Lobdell accordingly signed and addressed to Mr. Bartlett the following letter: "August 5th 1844. The agreement between Mr. Montague and myself is simply this: We have purchased an estate of F. C. Head and T. Motley, Jr., on Washington Street, which has by mutual consent been conveyed to me (I having paid and secured the purchase money); whatever disposition is made of the property, the profit and loss is to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect."

Lobdell afterwards, with the consent of the plaintiff, expended large sums of money upon the estate, and sold it in separate lots, taking in some instances mortgages to secure the purchase money, on some of which he received large sums of money for which he never accounted to the plaintiff, and under which he afterwards entered and foreclosed and continued in possession until his death. His estate was represented insolvent, and his administrators, heirs and devisees appeared and answered in this suit.

B. F. Brooks & J. D. Ball, for the plaintiff, cited, to the point that a contract of partnership existed between the plaintiff and Lobdell, which equity would enforce, Collyer on Part. §§ 16, 17, 55, 160, 173; *Fall River Whaling Co.* v. *Borden*, 10 Cush. 458; *Reid* v. *Hollinshead*, 4 B. & C. 878; *Forster* v. *Hale*, 3 Ves. 696, and 5 Ves. 308; *Dob* v. *Halsey*, 16 Johns. 34; *Bunnel* v. *Taintor*, 4 Conn. 568; to the point that Lobdell's letter to Bartlett satisfied the statute of frauds, Rev. Sts. *c.* 59, § 30; *Barrell* v. *Joy*, 16 Mass. 221; *Fowle* v. *Freeman*, 9 Ves. 351; Lewin on Trusts, *c.* 4, § 2; to the point that the plaintiff's claim was not a mere debt, but that he had a right to a specific portion of the property, and, if it had been sold, to the proceeds;

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Story on Part. §§ 407, 408; 3 Kent Com. (6th ed.) 65; Collyer on Part. §§ 125, 127; *Dyer* v. *Clark*, 5 Met. 562; *Howard* v. *Priest*, 5 Met. 582; *Parker* v. *Muggridge*, 2 Story R. 334; Cross on Liens, 193; and that Lobdell's creditors could take no greater interest than he could, *Dyer* v. *Clark*, 5 Met. 562; *Root* v *Blake*, 14 Pick. 273.

S. Bartlett & C. F. Choate, for Lobdell's administrators, cited to the point that there was a partnership in the profits or profits and loss only, and not in the capital, *Meyer* v. *Sharpe*, 5 Taunt. 74; *Ex parte Hamper*, 17 Ves. 404; *Smith* v. *Watson*, 2 B. & C. 401; Story on Part. § 27; *Pitts* v. *Waugh*, 4 Mass. 224; *Forster* v. *Hale*, 5 Ves. 314; that Lobdell's letter did not contain the entire contract, and equity would not execute it; *Smith* v. *Burnham*, 3 Sumner, 435; *Abiel* v. *Radcliffe*, 13 Johns. 297; *Dwight* v. *Pomeroy*, 17 Mass. 303; *Brooks* v. *Wheelock*, 11 Pick. 439; that creditors have rights to property as against a dormant partner, *Lord* v. *Baldwin*, 6 Pick. 348; *French* v. *Chase*, 6 Greenl. 166; *Cammack* v. *Johnson*, 1 Green Ch. 163; that under our statute neither an express trust, nor the implied trust which the law raises in case of partnership, can defeat creditors or *bona fide* purchasers without notice, Rev. Sts. *c.* 59, §§ 30–32, and commissioners' note; and that in an insolvent estate, the administrators represent the creditors, *Holland* v. *Cruft*, 20 Pick. 321.

G. Bancroft, for the heirs and devisees.

By the Court. The letter to Mr. Bartlett was a valid offer; and being accepted and acted upon by the parties, it constituted a contract by which either a trust or a partnership was created. And whether a trust or a partnership, Lobdell became accountable for the proceeds of the sales, and this liability devolved upon his administrators.

If the property has been alienated, it having been done in pursuance of the arrangements between the parties, the title was vested in the purchasers, discharged of the trust; and therefore, if all the property has been alienated, no specific performance in the way of a transfer of real estate can be decreed.

If the property bought and held under the agreement has been sold, and mortgages taken back by Lobdell to secure the

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whole or part of the purchase money, such mortgages constitute a part of the trust or partnership fund, and must be deemed a part of the trust property in which the plaintiff has a right and interest, the extent of which is to be determined by taking an account.

The case must be referred to a master to state an account. Lobdell's estate is to be allowed interest on the half of the purchase money advanced by him for William H. Montague, and is to be allowed for all other moneys advanced and for expenses.

Whether the plaintiff can have a preference over other creditors depends on the question whether the specific trust property or mortgages taken to secure the purchase money on sales thereof remain, or whether the balance, if any, due the plaintiff results only in a sum which is a debt due from Lobdell's estate. This question will properly arise when the master reports; all other questions to be reserved till the coming in of the report.

Ordered accordingly.

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SUPPLEMENT.

Under the twenty-first article of amendment of the Constitution, the mayor and aldermen of Boston in the county of Suffolk and the county commissioners in other counties are empowered to apportion the number of representatives assigned to the county among the representative districts formed by them, under said article, as well as to form the districts; and their doings and returns in the premises are conclusive, and cannot be revised by the house of representatives in judging of the returns of elections and qualifications of its members.

THE undersigned, justices of the supreme judicial court, have received a communication from the honorable the house of representatives, requesting their opinion upon the following questions, to wit:

"First. Does the twenty-first article of amendment of the Constitution confer on the commissioners named in that article, or, in the county of Suffolk, on the mayor and aldermen of the city of Boston, any power to apportion the number of representatives to which the county is entitled, among the representative districts formed by them pursuant to that article? Or, in other words, does the power of the said commissioners, or mayor and aldermen, extend to the assignment of the number of representatives to which the districts formed by them are entitled, as well as to the formation of such districts?

"Second. When the said commissioners or mayor and aldermen have divided the county into representative districts, and apportioned the representatives to which the county is entitled among such districts, is it competent for the house of representatives, in judging of the returns of elections and qualifications of its own members, to revise their said proceedings in whole or in part, and to change the number of representatives so apportioned to any district or districts, if satisfied that such number is different from the number to which such district or districts would be entitled, if determined exclusively by the enumeration

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of legal voters, taken pursuant to said twenty-first article of amendment?"

Whereupon the undersigned, having taken the said questions into consideration, do thereupon ask leave respectfully to submit the following opinion:

Upon the first question we are of opinion, that the twenty-first article of amendment of the Constitution, which took effect and went into operation in 1857, did confer full power on the commissioners named in that article, in all the counties except Suffolk, and in the county of Suffolk on the mayor and aldermen of the city of Boston, to apportion the number of representatives to which such county might, by the act of legislation therein provided for, be entitled to, among the representative districts to be formed by them pursuant to said article; and that the power of the said commissioners in the several counties, and of said mayor and aldermen in Suffolk, did extend to the assignment of the number of representatives to which each of the districts to be formed by them would be entitled, as well as to the formation of such districts.

We are of opinion, founded on all the terms and provisions of the twenty-first article of amendment, as well as on the objects and purposes proposed to be accomplished by this change in an important part of the Constitution, that it was intended to vest in the county commissioners for the several counties, and in the mayor and aldermen of the city of Boston — unless special commissioners should first be elected for that purpose, in the manner directed by that article for the exercise of the same power, which was not done — not only to form the several towns in each county, and wards of each city in their respective counties, into local districts, to be designated by metes and bounds, and further designated by a specific enumeration, not dividing any town or any ward of a city, and make return thereof; and therein to specify and declare the number of representatives, which each of said districts shall have a right to send to the general court, to constitute the house of representatives; the number thus assigned to each district, and thus declared and returned, not to be less than one nor more than three in each district. And we may add that, in our own opinion, these

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boards of commissioners — no special commissioners having been elected for the purpose — would not have fully executed the power confided to them by this constitutional provision, nor fully have performed the duty required of them, if they had not thus assigned, designated and specified, and declared in their returns, the number of representatives to which each district should be entitled, until the time for a new formation of a district and apportionment of representatives.

Perhaps it may not be easy, in a short space, to state all the reasons on which this opinion is placed; but we will mention some of the most prominent.

This amendment contemplated and provided for carrying into effect one of the most important changes which could be made in the Constitution of the Commonwealth. Nothing can more deeply concern the freedom, stability, the harmony and success of a representative republican government, nothing more directly affect the political and civil rights of all its members and subjects, than the manner in which the popular branch of its legislative department is constituted. We do not here speak of it in its character as a true representative of the interests, the intelligence and the will of the whole, and all the parts of the constituent body, but as a practical scheme of measures for the accomplishment of a great object. It obviously required a system of plain, simple and intelligible rules, easy to be understood, and to be carried practically into execution by hundreds and thousands of town and city officers of all degrees of intelligence. And this system was designed to supersede and replace the long practice of electing representatives through the medium of town organizations, and the agency of municipal officers, a practice which had grown so familiar from experience and habit, that it was almost impossible that any mistake could be made. These considerations, it appears to us, must have been deeply impressed on the minds of the legislatures and people of the Commonwealth, in proposing and adopting this amendment, and must therefore be kept steadily in view in putting a construction upon it, both in its general scope and in all its details.

The great object to be attained manifestly was to reduce

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greatly the number of representatives, and, in conformity with the theory of representation, to secure as nearly as possible an equality in the ratio of representatives and legal voters throughout the Commonwealth. This object might be accomplished in any one of various modes. The amendment itself might have divided the State into districts, and have apportioned the representatives among them; or it might have authorized the legislature to do the same thing; or it might authorize the legislature to do it in part, and provide that the details should be completed by another body specially designated and empowered for that purpose. This was the expedient actually adopted. A census of the number of legal voters in each city and town being first made, as provided for in the amendment, the legislature were required to apportion the two hundred and forty representatives among the several counties of the State. Then, unless a law should be passed providing for the election of a board of special commissioners in each county — and no such law was passed, and no such special commissioners were elected — the mayor and aldermen of the city of Boston, the county commissioners of other counties than Suffolk, should on the first Tuesday of August after each assignment of representatives to each county, assemble at the shire town of their respective counties, and proceed as soon as may be to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the number of legal voters in the several districts of each county.

Such was the system provided. The legislature, had they seen fit, might have postponed making the apportionment among the counties, and in the mean time have provided by law for the election of special commissioners, which would have extended as well to Suffolk as to the other counties; had they done so, the powers of such special commissioners would have been precisely the same in all the counties. The legislature passed no such law; on the contrary, they made the apportionment among the counties, which, by the amendment, the secretary of the Commonwealth was required forthwith to certify to the board authorized to divide each county into repre

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sentative districts. It became therefore the duty of the mayor and aldermen of Boston to proceed and perform the same duties for the county of Suffolk, which special commissioners would have been authorized and required to do, had they been elected as provided in this amendment.

These boards are to divide the respective counties into representative districts, so as to apportion, as nearly as may be, according to their relative number of legal voters; but this is to be done under several absolute and inflexible conditions, prescribed by the Constitution, by which they are bound.

1. No town, and no ward of any city, can be divided in forming a district.

2. No town or ward of a city can be united with any other town or ward of a city to form a district, unless they are contiguous to each other.

3. No district can be formed, embracing so large a number of voters as, according to the ratio for such county, would enable it to send more than three representatives.

Subject to these conditions, having a regard to the relative number of voters in each town, and city ward, so far as it can be had, consistently with these fixed conditions, they are to form representative districts with such number of voters as to enable them to chose one, two or three representatives. To illustrate this: They must first ascertain the ratio between the voters and the representatives, by taking the whole number of voters in the county, and dividing that number by the number of representatives assigned to it. This must, almost of necessity, certainly according to the doctrine of chances, leave a fraction for which it may in some cases be necessary to provide. Having established the ratio for one, it is for the board to form districts having within them numbers, as near as may be in reference to other conditions, to the ratio thus found, to choose one representative, or twice that number to choose two, or three times that number to choose three. This is clearly within their express authority. They are bound to have this consideration in their own mind, in forming, describing and numbering each district, whether it is a district for one, two or three; this they are bound to do by the regard they are bound to have to

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equality in the ratio between voters and representatives. They are bound to form the district with a view to the number of the representatives to which such district shall be entitled, whether they are bound to express it in their return or not.

In many counties there may be a great variety of circumstances calling for the exercise of judgment in the formation of districts. The county of Middlesex has, we believe, fifty two towns and cities, forty nine towns and three cities. Suppose each city has six wards, here are sixty seven organized bodies, with some very large towns and some very small ones, to be classed and grouped together into districts, so as, in the whole, to elect thirty eight representatives. We will not undertake to imagine the great variety of complex circumstances under which, according to the Constitution, this duty is to be done. Without putting particular cases by way of illustration, which might be greatly extended, it seems that equality between voters and representatives cannot be reached, and, indeed, was not contemplated by the amendment, except that "as nearly as may be" approximation to this equality is to be sought by those whose duty it is to form the districts. In forming districts with a view to such approximation, they must take into consideration,

1st. The absolute number of voters in each town and city ward of the county, as fixed by the census for the occasion.

2d. Whether that number is over or under the ratio of voters to a representative for that county, as first found, and how nearly it approaches that ratio for one, or double that number for two, or treble that ratio for three representatives.

3d. Whether any one town, or city ward, with reference to that ratio, can be constituted one district approximating nearly, and how nearly, to the ratio for sending one or more; or whether any such town or city ward can be so combined with any other one or more towns or city wards, so that the aggregate of voters in the towns or wards so combined shall approach nearly, and how nearly, to such ratio, or its duplicate or triplicate.

Thus it will be perceived that the great principle of equality of representation, or the nearest practicable approximation to it, which lies at the foundation of this whole constitutional pro-

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vision, is to govern, subject to the inflexible restrictions not only in apportioning the representatives to the district, but in the mode of forming the districts, so as to bring that approximation as near as may be to the true equality. They had full authority to form these districts, with reference to the election of one, two or three representatives, and were bound to be governed by the great principle of equality in doing it, conformably to the tenor of the constitutional amendment under which they acted. Here then there was abundant room for the exercise of reason and judgment in forming the districts; they must have formed them with the view to their right to elect one, two or three representatives, and it would seem to be necessarily incident to the completion of the work, that they should declare and return the number intended that each district should be entitled to elect.

Thus far we have drawn our illustrations respecting the powers of the commissioners, and mayor and aldermen, from the cases which may be supposed to arise in other counties than Suffolk. The circumstances indeed, on which the commissioners were to act, might be considerably different, inasmuch as the city at no distant period had been divided into twelve wards, then nearly equal, for the purposes of representation in the city council. There would therefore be likely to be fewer cases of complex and extraordinary facts, calling for the exercise of judgment, though there had come to be large discrepancies between the numbers of inhabitants, and still greater of legal voters, in the respective wards. But the same powers are given in the same terms to the mayor and aldermen in Suffolk and the commissioners in other counties, and no purpose is shown in the amendment, to invest them with other or different powers.

Again; this constitutional amendment not only vested in the mayor and aldermen the power to form districts in the county of Suffolk after the census and apportionment of 1857, but also after that to be made in 1865, and every tenth year after, to all future time. There may or may not be a new arrangement of the city into wards, by increasing or diminishing the number of wards, or by an entirely new division. If no such new arrangement of wards is made before 1865, or the next or some succeeding decennial term, judging from experience, there will

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probably be a much greater disparity in the number of legal voters than at present. Some one or more will perhaps have so increased, that when the ratio for the county is established, they may be found to have over four times that number; but by the inflexible rule it can have but three representatives. Some one may have so far decreased as to fall short of the ratio for one. But by the same inflexible rule, it cannot be disfranchised. It may not be contiguous to any other ward, with which it may be united, without making the aggregate number of voters more than enough by the ratio for three; it must therefore, however small, be constituted a district to choose one.

Here then would be room and a great demand for the exercise of reason and judgment in determining, among various methods placed within their reach, how the district should be formed, and a determination, somewhat judicial in its character, how many representatives each district is entitled to elect.

But at the time of the adoption of this amendment, it could not be known that such questions would not arise in Suffolk as well as in other counties; and the power was given to the commissioners of all counties alike, to meet all cases to which it could extend at the first or subsequent establishment of districts.

The makers of this constitutional amendment, not having formed the State into districts for the election of representatives, not having vested the power in the legislature to form the counties into districts, but only to apportion the two hundred and forty representatives among the counties, must have felt the necessity of providing a body, competent in their view to perform this duty fully and completely. They must have understood that, in the performance of this duty, the questions herein before suggested, and many others not capable of being solved by mere computation, must arise, and must be determined by sound judgment. The question then recurs, looking at the exact terms of the amendment and its obvious purposes, to what body was this duty entrusted, and what powers were vested in them to enable them to perform it?

We can have no doubt, that this whole duty was confided to the county commissioners for other counties, and to the mayor and aldermen of Boston for the county of Suffolk, there being

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no county commissioners in this county. The terms, though not clear and explicit, do in our opinion import this. They are to divide their respective counties into representative districts, so as to apportion the representation equally, as near as may be, according to the number of voters in each district. There is a slight obscurity in the sentence, which would be removed by a slight change in the words. If there were a comma after "voters," and the word "in" were "to," it would be somewhat more free from obscurity. But we think the meaning is, "so as to apportion," or "so that they may apportion" "in" or "to" the districts. But this is confirmed by the residue of the provision prescribing the duty of the commissioners.

The districts in each county shall be numbered by the board, and a description of each, so numbered, with the number of legal voters in such county, shall be returned by the board to the secretary of the Commonwealth, the county treasurer of each county, and the clerk of every town in each district, to be filed and kept in their respective offices.

Here, then, is the purpose for which these returns are to be made: not for revision or correction, not for acceptance or rejection, or recommitment, but for preservation and information; a final act, determining the rights of all parties concerned, and in effect standing as part of the Constitution during the decennial period.

Again; it is not expressly required by the provision, that the board shall state the whole number of the representatives which they are required to apportion to the whole county; whereas by returning the number apportioned to each district, the aggregate of the numbers of representatives assigned to each district will show that they have rightly apportioned the whole number assigned to the county; and this leads to a strong conclusion, that such an apportionment to each district was to be made and returned by the commissioners.

But even should the commissioners return the whole number of representatives apportioned to the county, and that they had formed it into a given number of districts, stating the number of legal voters in each, without specifying the number of representatives to each district, the work would be very imperfect.

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For instance, in Suffolk there are two cities, Boston and Chelsea, and two towns, North Chelsea and Winthrop. Whether Chelsea is divided into wards or not, we do not know; probably it is. Suppose the mayor and aldermen had returned that they had apportioned twenty eight, the number of representatives assigned to the county by the legislature, and had formed it into thirteen districts, giving the number of voters in each, without more; it would be extremely difficult, if not impossible, to determine by mere calculation, what number each would be entitled to choose, on account of the fractions, larger or smaller, by which some districts would fall short, and some exceed the average ratio. But if it were possible to ascertain the number of representatives which each district would be entitled to elect, it must be through the medium of a complex and difficult calculation, to be made by the officers and voters at every election; whereas the article plainly requires a simple, recorded document, open to the inspection of all, stating in terms the number which each district may elect, for the government of all city, town and ward officers, in issuing warrants, calling and holding meetings, and for receiving and certifying votes, and also for the information and security of voters.

The question then recurs whether the doings and returns made conformably to the article of amendment are to be deemed conclusive?

This is a question of power. The power, whatever was its extent, was conferred when the amendment was adopted; it was conferred alike on the commissioners and on the mayor and aldermen in their respective counties; it was not limited to the state of things as it then existed, but was intended to adapt itself to all such changes and states of things as might arise at any future time. As the exigency of the case, namely, the regular and harmonious action of the government, required that the powers of those bodies, appointed in behalf of the people to establish representative districts, should be large and adequate to the occasion, to enable them to decide all questions incident to the establishment of such districts, within the limits prescribed by the article itself; as such exigency required that the execution of these powers should be definitive, (and no

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mode is suggested for the revision of the doings of the commissioners;) the conclusion is that the decisions of the various questions before them, made by the bodies thus empowered, as expressed in their final action and returns, must be taken to be decisions made by a body of competent jurisdiction, duly authorized by the Constitution, and are therefore conclusive.

In answer to the second question, the undersigned are of opinion that it would not be competent for the house of representatives, in the case supposed, in judging of the returns, elections and qualifications of its own members, to revise the proceedings of the county commissioners and mayor and aldermen, in whole or in part, and to change the number of representatives, by them apportioned to any district, if satisfied that such number is different from the number to which such district would be entitled, if determined exclusively by the enumeration of legal voters, taken pursuant to said twenty-first article of amendment.

The house of representatives are, by the Constitution, final judges of the returns, elections and qualifications of their own members. Their duty is, we think, rather to judge of the rights of persons returned as members, and claiming to be members, than of the rights of districts or constituencies, although the latter may sometimes be incidentally involved. For instance, in the case suggested by the question, suppose three members are returned by a district to which three were assigned, and suppose another, to which two only were assigned, claiming a right to send three, had elected and returned three; the whole six could not hold seats, and the house must decide between them. But in coming to that decision, they must, in our opinion, look exclusively to the act done by the commissioners pursuant to the Constitution, by which the districts were formed, and the number of representatives assigned to each. Were it otherwise, it appears to us that great confusion would follow. If the house could decide between two particular districts, coming before them by petition or otherwise, each claiming a superior right to the other, then any and all the other thirteen or fourteen districts in Suffolk might come before the house in the same manner, to have their rights determined. So of the county of

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Middlesex, with its forty nine towns and three cities to choose thirty eight representatives; it may be divided into any number of districts not less than thirteen nor more than thirty eight. Should any error be discovered in combining contiguous towns and city wards into districts, or in the computation of the numbers of voters, necessary to the apportionment of representatives among them, the whole might be revised, and many changes of representatives made, and yet such act of the house could only extend to the elections for one year.

No; it is obvious that if the Constitution had itself framed the districts, and apportioned the representatives, it must be taken by the house to be conclusive, although errors of computation might afterwards be discovered in the application of the principle of distribution adopted by its framers. Now, when a part of this duty was ordered to be done and returned by other public bodies, and recorded in various public offices, for the general and authoritative information of all officers and voters, it was an act done by the delegated authority of the Constitution, and ought to have the same practical effect as if done in terms by the framers of it.

For the reasons given in answer to the first question, therefore, we are of opinion that the house of representatives, in exercising the right vested in them by the Constitution respecting the election of members, are bound to take the formation of districts, and the apportionment of representatives to each district, as made and returned by the county commissioners and the mayor and aldermen of Boston in their respective counties, to be conclusive.

If it shall be asked what shall be done if one of these apportionments and returns shall be discovered to be erroneous, one answer is that the Constitution has provided no power competent to inquire into and correct any such error. Some error may occur in all human transactions, and therefore even those who may discover or think they have discovered an error, may themselves have fallen into error in conducting their inquiries and making their computations. But the final power must rest somewhere, and the exigencies of government will not admit of its waiting in its movements until all possible errors in its constitution and organization are removed.

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All public officers who are charged with the performance of public duties, and who may be guilty of fraudulent, wilful and corrupt conduct in the discharge of them, are liable to prosecution and punishment therefor, by impeachment or indictment; but even punishment for their misdeeds may not necessarily correct them, though it may afford an additional security to the public against their perpetration.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
GEORGE T. BIGELOW,
BENJ. F. THOMAS,
PLINY MERRICK.

Boston, March 11th 1858.

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sum; and, on the opposite page, these words: "Went into chancery, but paid nothing." He did prove against that son's estate in insolvency the sum thus charged in the book, and interest, and assented to his discharge. *Held*, that this sum was not an advancement, under the Rev. Sts. *c.* 61, § 9. *Bigelow* v. *Poole*, 104.

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to accept and send for, is not liable for their destruction by fire without his fault, after the owner has had a reasonable time to remove them. *Carnes* v. *Nichols*, 369.

BANK.

By a fraudulent conspiracy between the paying teller of the Merchants' Bank, the teller of the Atlantic Bank, and a broker, the broker drew a check on the Merchants' Bank, where he had no funds, which the paying teller marked "good," and the broker took it to the teller of the Atlantic Bank, who gave him the money for it in current bills, partly on the Atlantic Bank and partly on other banks. The broker took these to the Merchants' Bank, and gave them to the paying teller, who, for the purpose of covering a deficit, unknown to any of the bank officers, in his cash, which was to be counted that afternoon, placed them with it. The purpose for which the money was obtained was known to the two other parties, but no other officer of either bank knew anything of the transaction. The paying teller's cash was produced by the cashier to the directors, and counted by them that afternoon, approved and returned to him. The next morning he committed suicide, the check was presented at the Merchants' Bank and payment refused. *Held*, that the Merchants' Bank could not hold the money as against the Atlantic Bank, and were liable to the latter, after demand, in an action for money had and received. BIGELOW and MERRICK, JJ. dissenting. *Atlantic Bank* v. *Merchants' Bank*, 532.

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See MASTER AND SERVANT, 1.

DAMAGES.

1. In an action for not delivering stock according to an order which specifies no time of delivery, the measure of damages is the value of the stock when demanded. *Eastern Railroad* v. *Benedict*, 212.
2. One who has contracted to build the sea-wall of a wharf, and failed to perform his contract, and, on being requested to rebuild it, promised to do so, and thereby induced the other party to delay rebuilding it himself, is liable for the

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loss of rent of the wharf occasioned by his own negligence. *Willey* v. *Fredericks*, 357.

3. The measure of damages against a wrongdoer for the conversion of plates for printing labels or advertisements, of great value to the owner, but of very trifling value to others, is the value to him; and in estimating this the cost of replacing the plates may be considered. *Stickney* v. *Allen*, 352.

4. In an action for the conversion of chattels to the defendant's use, the measure of damages is not affected by the defendant's having, after the conversion, attached them on mesne process against the plaintiff, and then discontinued that action and offered to restore them to the plaintiff, who refused to receive them. *Ib.*

5. In an action for attaching property on mesne process against a third person, which remains in the plaintiffs' possession after the attachment and until judgment and execution thereon, the measure of damages is the value of the property at the time of its being taken on the execution. *Henshaw* v. *Bank of Bellows' Falls*, 568.

6. In an action of tort for obstructing a right of way, damages for the consequent diminution of rents cannot be recovered unless specially alleged in the declaration. *Adams* v. *Barry*, 361.

See ESTOPPEL; INSURANCE, 4, 12; JUDGMENT, 4.

DECLARATION.

See PLEADING, II.

DEED.

1. A deed of "a certain parcel of land, situated in A., being my homestead, containing two hundred acres, being the same estate now occupied by me," does not pass four lots in the occupation of tenants at will, although included in two hundred acres in A., owned by the grantor; and cannot be contradicted by extrinsic evidence of an intent of the parties to include those lots. *Warren* v. *Coggswell*, 76.

2. A conveyed to B a lot of land bounded "south on a passage way twenty feet wide," "also such rights on the beach lying directly between the passage way and the sea, as were" conveyed to the grantor by F, by a deed which passed the beach as appurtenant. B conveyed to C this lot, describing it as "bounded southeasterly on a passage way," and as "entitled to the privilege, mentioned in a deed from F to A, to which reference for further particulars may be had." *Held*, that the beach passed under both deeds. *Cook* v. *Farrington*, 70.

3. A deed by a tenant in common of "sixty four rods, being part of" the lot held in common, passes no title in common; nor in severalty, without possession taken under it of the part claimed. *Phillips* v. *Tudor*, 78.

4. A deed of land, *habendum* "with all the privileges and appurtenances to the same belonging excepting all the wood and trees on a certain island I reserve to the grantee his heirs and assigns forever," and concluding "it is to be understood that the wood above mentioned is reserved to the grantor and his heirs

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forever," reserves to the grantor an estate of inheritance in the wood and trees only then growing, with a right in the soil for their growth and nourishment, and the privilege of entering to take them away. *Putnam* v. *Tuttle*, 48

See EVIDENCE, 6–8; FLATS, 2; WAY, 1.

DEMAND.

See ARBITRAMENT AND AWARD; EMBEZZLEMENT, 4; MORTGAGE, 2, 4; PLEADING, 5.

DEMURRER.

See PLEADING, 7.

DEPOSITION.

In a deposition taken by commission objections to the form of interrogatories must be taken before the commission issues. *Adams* v. *Wadleigh*, 360.

See EVIDENCE, 14.

DEVISE.

See WILL.

DIRECTORS.

See INSURANCE COMPANY; MANUFACTURING CORPORATION, 3, 4.

DIVORCE.

See HUSBAND AND WIFE, 2, 3.

EASEMENT.

The passage of water from rain and melting snow over the surface of land for twenty years gives no right to its continuance. *Park* v. *City of Newburyport*, 28.

See EVIDENCE, 19–21; LIGHT AND AIR; WAY.

EMBEZZLEMENT.

1. The treasurer of a railroad corporation is an "officer, agent, clerk or servant of an incorporated company," within the Rev. Sts. c. 126, § 29, relating to embezzlement by such persons. *Commonwealth* v. *Tuckerman*, 173.
2. If money of a railroad corporation is received by their treasurer, and by him deposited to his credit as such treasurer, and afterwards drawn out by him either in bills or coin, such bills or coin are the property of the corporation, and, while in the hands of the treasurer, subjects of embezzlement by him; and if he afterwards, while still treasurer of the corporation, fraudulently converts such money to his own use, without their consent or knowledge, and without claim of right, it is embezzlement; although the guilty intent does not exist at the moment of drawing the money out of the bank, but is formed afterwards; and although at the time of the fraudulent conversion he intends to restore the amount, and has property sufficient to secure its restoration. *Ib*

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3. Upon the trial of an indictment for embezzlement, other previous acts of a similar character, enumerated with the one charged in the indictment in a paper drawn up by the defendant as a statement of all sums taken by him, are admissible in evidence to show the intent with which the act charged was committed. *Ib.*

4. It is not necessary, in order to constitute embezzlement, that there should be a demand of the money alleged to have been embezzled, or a denial of its receipt, or any false account given of it, or false statement or entry concerning it, or refusal to account for it. *Ib.*

See EVIDENCE, 2.

EQUITY.

1. This court has no jurisdiction in equity to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified copy of which has been filed in the probate court here *Campbell* v. *Wallace*, 162.

2. If a trustee having power to sell, but not to mortgage, mortgages the trust estate, the remedy of any one claiming, either in his own right or as trustee, under the *cestui que trust* is at law and not in equity. *Peabody* v. *Harvard College*, 283.

3. Before the *St.* of 1854, *c.* 74, a bill in equity could not be maintained by one tenant in common against another for a partition of a wharf and appurtenant rights, and for an account of the profits received by the defendant while in possession of the estate; but might for an account, on striking out the prayer for a partition. *Hodges* v. *Pingree*, 14.

4. The *St.* of 1855, *c.* 194, by which this court "shall have jurisdiction in equity in all cases of fraud," confers no jurisdiction over suits commenced after its passage, and before it took effect. *Wheatland* v. *Lovering*, 16.

5. Specific performance of an agreement to convey land to a railroad corporation will not be decreed on a bill in equity filed by them more than three years after the other party has refused to perform it, and after they have located their road over other land including but a small portion of this, and after this land has greatly increased in value, without any steps taken by the corporation meantime to enforce the agreement. *Boston & Maine Railroad* v. *Bartlett*, 384.

See EQUITY PLEADING; LOAN FUND ASSOCIATION, 2; MANUFACTURING CORPORATION, 2, 4.

EQUITY PLEADING.

1. To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales. *Armstrong* v. *Crocker*, 269.

2. A bill in equity by the executrix of her deceased husband alleged that the

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plaintiff was inexperienced and unskilled in the care and management and in the value of property, and that the defendant undertook the general management of her affairs, volunteering his advice to her in all matters of business, and that the plaintiff had full confidence in the defendant and relied upon him to advise and aid her in her transactions, and did not buy or sell or lease property without the aid of his judgment. *Held*, that the answer sufficiently met this allegation by stating that the defendant could only refer to the plaintiff's declaration that her husband was in the habit of communicating to her his business transactions; that, although his property was large, it was such that its value and income, if not fully known, could be exactly ascertained by her upon the slightest inquiry; and that the plaintiff never expressed to the defendant any doubt of her capacity to take charge of all her property and protect all her interests, nor had he any doubt thereof; and which then stated in detail the facts of their intercourse, denying that the defendant ever acted for the plaintiff as an agent or in a confidential capacity. *Held, further*, that if the answer alleged that the plaintiff asked of third persons questions relative to her property, it need not state of what persons or concerning what property such questions were asked. *Ib.*

3. An allegation in equity, that the plaintiff repeatedly asked the defendant for his bill, is met by an admission in the answer that the plaintiff asked the defendant what she should pay him. *Ib.*

4. A bill in equity to compel the surrender of a lease alleged that the defendant, before anything was said on the subject by the plaintiff, applied to the plaintiff and solicited of her an extension of the building occupied by him, and a renewal of the lease, and then particularly set forth interviews between them, and that the defendant importuned her to renew the lease, and by these repeated applications and protracted importunities the plaintiff was persuaded to renew the lease on the terms desired. *Held*, that these allegations were sufficiently met in the answer by averring that the plaintiff herself, without any inquiry or allusion to the subject on the defendant's part, inquired if the defendant would so extend the building and take the lease; and by admitting the several interviews set forth in the bill, but averring that they were always conducted pleasantly, and that the defendant always allowed the plaintiff time for consideration; and by wholly denying that any of the pretended grievances, deceptions, fraudulent doings, importunities, persuasions and entreaties alleged in the bill were committed or practised by the defendant. But that an allegation in the bill that the plaintiff asked the defendant if he thought the rent agreed upon was a fair one, and that he answered affirmatively, was material and should be directly met in the answer. *Ib.*

ESTOPPEL.

The owner of property, by joining in a mortgage of it from another person, does not estop himself to assert his title as against any one but the mortgagee; and, in an action of trespass against an officer attaching it as the property of that person, may recover the full value of the property, notwithstanding a

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settlement made between the attaching creditor and the mortgagee without the mortgagor's assent. *Cram* v. *Bailey*, 87.

See PROMISSORY NOTE, 7.

EVIDENCE.

1. In a criminal case, in which the only evidence for the prosecution was the testimony of accomplices, the judge advised the jury to acquit, but instructed them that if upon the whole evidence they were convinced beyond a reasonable doubt of the guilt of the defendant, they should find a verdict of guilty. *Held*, that the defendant had no ground of exception. *Commonwealth* v *Price*, 472.

2. A treasurer of a railroad corporation, who had embezzled their funds, called upon a friend of his, who was a surety upon his official bond and stockholder in the corporation, for advice; and he urged him to go to the directors, and make a clean breast of it, and told him that it would be for his interest to make a full confession; but said nothing, in terms, of a prosecution; told him that the disgrace was in doing wrong, not in suffering punishment for it, and he had better stay and meet the punishment; and (as he testified) "advised him as a friend, a son." The next day they went together to see one of the directors, who, on this stockholder suggesting that he had influence with the other directors and could prevent a prosecution, stopped him, saying that he could and would make no promises, did not know what his own power or duty was, but would do all he rightfully and properly could to prevent his arrest and prosecution, and that he must confide wholly in him and his discretion. *Held*, that confessions made after these conversations were admissible in evidence against him. *Commonwealth* v. *Tuckerman*, 173.

3. On the trial of an indictment for receiving stolen goods, evidence is admissible of conversations between the defendant and the thief, before the commission of the offence, making arrangements for receiving the goods. *Commonwealth* v. *Jenkins*, 485.

4. In a book of original entry, entries of sales, begun by another person, but finished and the quantities and prices entered by the clerk producing them, are admissible in evidence of the sales, although he has no independent recollection on the subject; and copies of these entries, made by another in a second book, and verified by the witness, are also admissible, in connection with the first book. *Bradford* v. *Stevens*, 379.

5. In an action by the indorsee against the maker of a negotiable promissory note, the testimony of a bookkeeper who examined the plaintiff's books at time not shown to have been after the indorsement, that the books showed tha all the payee's notes had been sent to the indorsee for collection, but he could not say the note in suit was enumerated among those sent, is inadmissible for the plaintiff. *Noxon* v. *De Wolf*, 343.

6. A deed, under which a party to a suit claims title, being admitted by him on cross-examination to be in his possession, may be ordered to be produced and put in evidence, without calling the attesting witness. *McGregor* v. *Wait*, 72.

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7. The date of a deed is *prima facie* evidence of the time of its execution. *Smith* v. *Porter*, 66.

8. A deed to "Hiram Gowing, cordwainer," may be shown by parol evidence of the previous negotiations between the parties to have been intended for "Hiram G. Gowing," who was a person of middle age, and not for "Hiram Gowing," his son, who was but thirteen years old. *Peabody* v. *Brown*, 45.

9. The affidavit of a party to a suit, that he has made diligent search for a deed of assignment to him under the insolvent laws, and that it has been lost or mislaid, and is not to his knowledge recorded, is sufficient to allow the introduction of secondary evidence of its contents. *Brigham* v. *Coburn*, 329.

10. The testimony of the clerk of a commissioner of insolvency, that he drew the assignment of the estate of an insolvent debtor, and kept no copy of it; but that the blank form of a copy produced by him was the same used by the commissioner, and that he has filled it up from minutes on his docket, and believes it to be a correct copy of the assignment, is sufficient to verify the copy. *Ib.*

11. The presence of the respondent in court pending a bastardy suit, and at the passing of the final order, may be proved by parol evidence. *Power* v. *Fenno*, 249.

12. The testimony of arbitrators, or a majority of them, is admissible to show whether a certain claim was included in their award. *Hale* v. *Huse*, 99.

13. A minute upon a magistrate's book of a continuance of the examination of a poor debtor, not in the magistrate's handwriting, nor signed by him, and of which he has no independent recollection, is not sufficient evidence of a legal adjournment of the hearing. *Wetherbee* v. *Martin*, 245.

14. In replevin of property claimed under a mortgage, the deposition of the subscribing witness to the contents of the mortgage, and to his having seen the property described therein, is admissible to identify the property, although neither the mortgage nor any copy thereof is annexed to the depositions. *Newcomb* v. *Noble*, 47.

15. A debtor assigned to his creditor a mortgage of $500 as collateral security for the payment of his debt of $1400; he was afterward sued on the debt, and judgment rendered against him for the whole debt, and execution issued thereon and put into the hands of an officer, with instructions to collect $600, or obtain good security therefor; and the officer released the debtor upon receiving a promissory note for $600, which he indorsed to the creditor, who afterwards collected from the mortgagor the amount of the mortgage. *Held*, that in a suit upon the note the defendant, in order to show that the money received on the mortgage discharged the whole debt, might give in evidence an agreement in writing made by the parties, pending the former suit, by which, upon the payment by the debtor of $575 (which he had not since paid), the mortgage should be reassigned to him, otherwise judgment to be entered for that sum. *Prescott* v. *Pulsifer*, 49.

16. The certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that

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time, if supported by his oath that he examined the vessel, and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts. *Perkins* v. *Augusta Insurance & Banking Co.* 312.

17. A question "whether, if the foremast was sprung, the try-sail split and standing rigging such as to need replacing at" a certain port, "the master would probably have known it?" does not depend on nautical skill, and cannot be put to an expert. *Ib.*

18. A person sent to a foreign port to take charge of a vessel in distress, who ascertains by inquiry the prices of labor and materials necessary to repair vessels there, but has no other knowledge thereof, is not a competent witness on that subject. *Lewis* v. *Eagle Ins. Co.* 568.

19. In a controversy between proprietors of adjacent estates as to the width of a passage way between them, the descriptions in deeds of the estates to one under whom both proprietors claim title are admissible in evidence. *Brown* v. *Stone*, 61.

20. Admissions, made by a wife without her husband's knowledge, are not competent evidence of a way by prescription over land owned by them in her right. *McGregor* v. *Wait*, 72.

21. Admissions of a son, residing with his parents and managing their estate, are not competent evidence against them of a right of way over it, without proof of the extent of his agency. *Ib.*

22. The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is no evidence against his remainderman. *Ib.*

23. Conversations before the organization of a corporation, but in contemplation thereof, between persons who subsequently become officers and stockholders therein, are inadmissible against the corporation as evidence of an agreement to organize and transact business as a corporation without paying in the capital required by law; even if accompanied by evidence that the capital stock was afterwards pretended to be, but was not actually, paid in. *Fogg* v. *Pew*, 409.

24. Neither the return which an insurance company are obliged by law to make to the secretary of the Commonwealth, nor a contract between them and their agent, is admissible in an action upon a premium note given to them, to show that the company fraudulently held themselves out as solvent, or that their officers were aware of their insolvency; without evidence that these facts were known to the maker of the note, or influenced him to procure the insurance. *Ib.*

25. Declarations of an agent of an insurance company, who has authority only to obtain applications for insurance and transmit them to the company, are inadmissible to show that the company represented that their capital stock was paid in, when it was not. *Ib.*

26. Fraudulent representations of the officers of an insurance company, concerning the solvency of the corporation and the payment of their capital stock, are no defence to a suit upon a premium note given to the company, unless these representations were held out at the time when the note was made, and for the purpose of obtaining it. *Ib.*

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27. In an action for the price of goods delivered to a third person on the alleged credit of the defendant, the plaintiff cannot give in evidence his previous direction to his servant to refuse a further credit to that person. *Welch* v. *Merrill*, 91.

See APPEAL; AUDITOR; COVENANT; DEED, 1; DEPOSITION; EMBEZZLEMENT, 3; EXCEPTIONS, 2; EXECUTOR AND ADMINISTRATOR; FORGERY, 6, 8; INSURANCE, 15; JUDGMENT, 2, 3; MUTUAL INSURANCE COMPANY, 1; NUISANCE, 3; PROMISSORY NOTE, 2–5; SPIRITUOUS AND INTOXICATING LIQUORS, 2; WAY, 1; WITNESS.

EXCEPTIONS.

1. A bill of exceptions cannot be sustained unless it states enough of the evidence to show that the judge ruled erroneously and to the prejudice of the party excepting. *Fuller* v. *Ruby*, 285. *Hewes* v. *Hanscom*, 336.

2. The refusal of the judge presiding at a criminal trial to allow the defendant's counsel to read to the jury an adjudication by the highest court of another state that a statute like that upon which this prosecution is founded is contrary to the constitution of that state, is no ground of exception. *Commonwealth* v. *Murphy*, 1.

3. Exceptions do not lie to the discharge of a prisoner on *habeas corpus* by a single judge. *Wyeth* v. *Richardson*, 240.

See APPEAL; COSTS; JUDGMENT, 1; PROMISSORY NOTE, 4–6; SPIRITUOUS AND INTOXICATING LIQUORS, 4; WITNESS, 3, 4.

EXECUTION.

After a levy of an execution upon an equity of redemption in real estate by sale in a manner not authorized by law, the judgment creditor may obtain a new execution by *scire facias*, under Rev. Sts. *c.* 73, § 21. *Dewing* v. *Durant*, 29

See ARREST; POOR DEBTORS, 3.

EXECUTOR AND ADMINISTRATOR.

Under *St.* 1840, *c.* 97, providing that a sale of real estate by an executor or administrator under a license shall be valid as against any person claiming under the deceased, though the deed is not delivered within a year, if certain conditions are complied with and the price "duly accounted for," such accounting must be shown by the probate records. *Jewett* v. *Jewett*, 81.

See LIMITATIONS, 1–3.

EXECUTORY DEVISE.

See TRUST, 5.

FLATS.

1. General rules for the division of flats among coterminous proprietors of land bounding on the seashore must yield to lines established by a partition

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affirmed by the court, and acquiesced in by the parties for thirty five years. *Adams* v. *Boston Wharf*, 521.

2. Commissioners of partition of land bounded southwesterly on Second Street, northwesterly on B Street, and northeasterly "by the sea," made a return, of which a plan was made part whereon B Street was extended upon the flats at right angles with Second Street: and set off to P. a lot, beginning at the corner of said streets, and bounded southwesterly on Second Street for a certain distance, "then turning at right angles and bounding on land hereinafter assigned to M., and running northeasterly to low water mark, then running northwesterly as the channel runs to B Street, then by B Street as that runs to the corner begun at:" They set off to M. the next lot to the east of this, bounded southwesterly by Second Street a certain distance, "then turning at right angles and running northeasterly to low water mark, then turning again and running by the channel to land and flats hereinbefore set off to P., then turning again and running southwesterly along said land of P. to Second Street:" They left "undivided and unassigned" to G., the respondent in partition, the next lot eastwardly: And their return was accepted by the court, and acquiesced in by the parties for thirty five years. *Held*, that G. had no title in flats westerly of B Street, although independently of the partition they would have come within the lines, as established by the court, of the estate thus divided; or that if he had, no title in flats westerly of B Street was conveyed by a subsequent deed from him, of "a certain piece or parcel of land and flats," bounded southerly on Second Street, beginning at the land of M., and running easterly on said Second Street a certain distance, "then turning at a right angle and running northerly on other land of G. as far as his land extends, then beginning again at the first mentioned point and running northerly on land of M. and parallel to B Street as far as the land of G. extends; it being the intention of this instrument to convey" a certain amount "of upland, together with all the flats to said land belonging, running out as far as G. has a right to go, but without warranty as to the courses of the side lines over said flats; but meaning hereby to sell and convey said upland as above described, together with all the flats to said G. belonging, situated on the westerly side of a line beginning at the southeasterly corner of the granted land on Second Street, and running northerly at right angles with Second Street. *Ib.*

See DEED, 2.

FOREIGN CORPORATION.

See SERVICE OF WRIT, 2, 3; TRUSTEE PROCESS, 1.

FORGERY.

1. A bill of a bank in another state is a promissory note, within the meaning of the Rev. Sts. *c.* 127, § 2. *Commonwealth* v. *Woods*, 477. *Commonwealth* v. *Thomas*, 483.

2. An indictment for knowingly having in one's possession a false, forged and

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counterfeit promissory note is supported by evidence of the possession of a genuine note which has been altered. *Commonwealth* v. *Woods*, 477.

3. Knowingly having in possession and uttering five false, forged and counterfeit promissory notes, may be charged as one offence in one count. *Commonwealth* v. *Thomas*, 483.

4. An indictment is not repugnant and defective, which charges the defendant with the possession of five false, forged and counterfeit promissory notes, and then sets forth certain bills of a bank in another state, and alleges that the defendant "did utter and publish the aforesaid false, forged and counterfeit bank bills as true." *Ib.*

5. An indictment for having in possession and uttering five counterfeit notes, which sets out four notes, alleges that the fifth "is different from any above set forth," and then sets out one like two of the others, is sufficient to support a conviction. *Ib.*

6. An indictment for having a counterfeit bank bill at Boston "with intent then and there to utter and pass the same" is supported by evidence of possession with intent to utter and pass it at a place out of the State. *Commonwealth* v. *Price*, 472.

7. Possession of a counterfeit bill of a bank in this state, with intent to pass it in another state, is within the Rev. Sts. *c.* 127, § 8. *Ib.*

8. Under an indictment for having a counterfeit bank bill with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank bills is admissible to show guilty knowledge and intent. *Ib.*

FRAUD.

See BANK; EQUITY, 4; EVIDENCE, 23–26.

FRAUDS, STATUTE OF.

A promise to accept and pay an order for the delivery of stock in a corporation, which the drawee had agreed to pay for certain goods sold to him, is not within the statute of frauds, if those goods have been delivered to him; otherwise, if they have not. *Eastern Railroad* v. *Benedict*, 212.

See TRUST, 1.

FREIGHT.

See INSURANCE, 18–21; SHIPS AND SHIPPING, 2.

GOODS SOLD AND DELIVERED.

See EVIDENCE, 4; FRAUDS, STATUTE OF.

GRAND JURY.

See INDICTMENT, 1.

HABEAS CORPUS.

See EXCEPTIONS, 3.

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HIGHWAY.
See WAY.

HOMESTEAD.
See DEED, 1.

HOUSE OF REPRESENTATIVES.

Under the twenty-first article of amendment of the Constitution of Massachusetts, the mayor and aldermen of Boston, in the county of Suffolk, and the county commissioners in other counties, are empowered to apportion the number of representatives assigned to the county among the representative districts formed by them, under said article, as well as to form the districts; and their doings and returns in the premises are conclusive, and cannot be revised by the house of representatives in judging of the returns of elections and qualifications of its members. *Opinion of Justices*, 613.

HUSBAND AND WIFE.

1. Whether articles of separation, between husband and wife actually living apart, in which the husband covenants with a trustee to provide for the future separate maintenance of the wife, are valid in this commonwealth, *quære*. *Albee* v. *Wyman*, 222.
2. Whether a covenant, in articles of separation, that the husband will pay an annuity to the wife during her life, is discharged by her obtaining a divorce and marrying another man, *quære*. *Ib.*
3. By articles of separation a husband covenanted, in consideration of his wife's withdrawing a libel for divorce, to pay her a sum yearly during her life. The wife afterwards, by another similar libel, obtained a decree for divorce from the bond of matrimony, and for alimony, which by agreement was fixed at the sum payable under the articles; and the wife, after receiving two instalments of such alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum. *Held*, that the covenant, if ever valid, was discharged. *Ib.*
4. *It seems*, that an action for injury to real estate of a wife may be maintained by her husband alone. *Adams* v. *Barry*, 361.

See EVIDENCE, 20.

IMPROVEMENTS.
See SCHOOL HOUSE, 3.

INCOME.
See TRUST, 2.

INDICTMENT.

1. A grand jury, without examining witnesses anew, may find an indictment as a substitute for another indictment found by them upon an investigation of the facts at a previous term. *Commonwealth* v. *Woods*, 477.

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2. Whether it is a fatal variance, in setting out a bank bill according to its tenor, to substitute "Cashier" for "Cash^{r} —" *quære*. *Ib.*

3. It is no variance in an indictment to set forth a name as "Droun," which is actually "Drown." *Ib.*

4. Under the Rev. Sts. *c.* 137, § 11, a person indicted for an assault with intent to murder may be convicted and sentenced for an assault without felonious intent. *Commonwealth* v. *Lang*, 11.

5. The eleventh section of the Rev. Sts. *c.* 137, providing that any person indicted for a felony, and acquitted of part of the offence charged, and convicted of the residue, may be adjudged guilty of the offence, if any, substantially charged in the residue of the indictment, is not unconstitutional as conflicting with the twelfth article of the Declaration of Rights. *Ib.*

See FORGERY, 2–6; LARCENY; NUISANCE.

INSOLVENT CORPORATION.

See CORPORATION, 2; MANUFACTURING CORPORATION, 2, 3.

INSOLVENT DEBTORS.

1. The assignee of an insolvent debtor may maintain an action in his own name upon a bond for the liberty of the prison limits, made to the insolvent after the appointment of the assignee, to obtain a release from arrest on an execution issued before such appointment upon a judgment on a debt which would pass to the assignee by the assignment. *Wetherbee* v. *Marvin*, 245.

2. The individual liability of stockholders or officers of a manufacturing corporation for debts of the corporation under the Rev. Sts. *c.* 38, and *St.* 1851, *c.* 315, cannot be proved against their estates in insolvency. *Bangs* v. *Lincoln*, 604.

3. The assent of three fourths in value of the creditors of an insolvent debtor, which is requisite to his second discharge under *St.* 1844, *c.* 178, § 5, must be filed within six months of the date of the assignment. *Wills* v. *Pritchard*, 327.

4. Jurisdiction in proceedings in insolvency, pending before a commissioner when the *St.* of 1856, *c.* 284, took effect, vested upon his subsequent death in the judge of insolvency, and not in the judge of probate. *Osgood* v. *Fernald*, 57.

5. If a partnership, whose principal business is to purchase supplies for and sell iron manufactured at iron works owned by one of the partners, becomes insolvent, a claim for supplies sold and delivered to the partnership, without knowledge that that partner only was interested in the works in which they were to be used, can be proved against the partnership estate only, under *St.* 1838, *c* 163, § 21, and not against the separate estate of that partner. *Tremlett* v. *Hooper*, 254.

6. Materials charged and shipped by a partnership in their usual course of business, to works of one partner, on the day of the failure of all the partners, are to be treated as the property of that partner, and not of the partnership, in marshalling their assets in insolvency, under *St.* 1838, *c.* 163, § 21. *Fisher* v *Minot*, 260.

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7. Under *St.* 1838, *c.* 163, § 21, where a partnership and its members are in insolvency under one commission, and the separate estate of one partner is more than enough to pay his separate debts, the surplus of that estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts, before paying interest on the separate debts. *Thomas* v. *Minot*, 263.

See ADVANCEMENT; BOND; EVIDENCE, 9, 10; MANUFACTURING CORPORATION, 2; PRINCIPAL AND AGENT, 2; TRUSTEE PROCESS, 1; WRIT.

INSURANCE.

I. *Fire Insurance.*

1. Two partners, in an application for insurance on a building, which was required to contain "a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which it stood. In fact, one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should "stand good." *Held*, that the insurers were liable for a loss by a subsequent fire. *Collins* v. *Charlestown Mutual Fire Ins. Co.* 155.

2. A description in an application for insurance of a building as used "for the manufacture of lead pipe," or "of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe. *Ib.*

3. In a policy of insurance upon a saw-mill, the assured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work; watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till h returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to and habitually did examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. *Held*, that the term "good watch" must be interpreted to mean "suitable" or "proper watch"; and that it was for the jury to decide whether the watch kept was a

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suitable and proper one, and whether the risk was affected by the watch actually kept, as compared with the one stipulated for. *Parker* v. *Bridgeport Ins. Co.* 302.

4. Insurance against fire was effected on goods "contained in a granite store"; one of the walls gave way, and half of the store and the whole of the adjoining building fell; before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall. *Lewis* v. *Springfield Fire & Marine Ins. Co.* 159.

II. *Life Insurance.*

5. Under a policy of life insurance, to "terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable," if the day of payment falls on Sunday, the premium is not payable until Monday, even if the assured dies on Sunday afternoon. *Hammond* v. *American Mutual Life Ins. Co.* 306.

III. *Marine Insurance.*

6. A policy of insurance from an insurance company established in another state, signed by their president and secretary there, but not to be valid until countersigned by their agent here, and issued by such agent here, is to be interpreted by the law of Massachusetts; and one third new for old is therefore to be deducted in estimating a constructive total loss under it. *Heebner* v. *Eagle Ins. Co.* 131.

7. This indorsement upon a policy of insurance, "Pay under the within policy to J. S. or order," is only an order to pay him the amount of any loss, and not an assignment of the policy; and if the policy stipulates that it shall "be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers," an assignment of the policy and assent of the insurers cannot be shown by oral evidence. *Minturn* v. *Manufacturers' Ins. Co.* 501.

8. A vessel was insured "at and from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port (European) between Tarragona and Gibraltar, and at and thence to New York." Four months after, this memorandum was indorsed on the policy: "Permission is given to stop at one other port between Tarragona and Gibraltar, paying one fourth additional premium if liberty is used." *Held*, that this gave permission to stop between Tarragona and Gibraltar upon the homeward voyage from Tarragona, but not to stop at Gibraltar also. *Perkins* v. *Augusta Ins. & Banking Co.* 312.

9. A policy of insurance on a vessel is not avoided by her going out of her course to obtain necessary medical assistance for the captain's wife; and the question of the necessity is for the jury. *Ib.*

10. Taking on board water and additional cargo, at a port into which a vessel has gone to obtain necessary medical assistance, does not avoid a policy of insurance on the vessel, unless it increases the delay or the risk. *Ib.*

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11. A policy of insurance on a ship against "total loss only," even if a time policy, covers a constructive total loss. *Heebner* v. *Eagle Ins. Co.* 131.

12. Under a policy of insurance upon a steamer, which exempts the insurers from liability for breaking of the machinery unless occasioned by stranding, the insurers, if the vessel is injured first by perils of the sea and afterwards by stranding, are liable only for so much of the injury as the assured prove to have been occasioned by the stranding. *Ib.*

13. In computing a constructive total loss on a vessel stranded on the west coast of the United States, an assessor allowed two months' interest on the funds raised for repairs. *Held*, that this assessment could not be increased by the court without evidence to overcome the assessor's report. *Ib.*

14. Under an open policy of insurance in common form, containing the usual memorandum clause, and also this clause, "partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates is excepted," the insurers are liable for a constructive total loss of tin plates; and if a number of boxes of tin plates, shipped and valued as one parcel, is damaged by the stranding of the ship, carried to the nearest market and there sold for less than half its valuation in the policy, deducting the necessary expenses of the transportation and sale, and duly abandoned, it is a constructive total loss. *Kettell* v. *Alliance Ins. Co.* 144.

15. In an action on a policy of insurance for a constructive total loss, if the plaintiff in his claim of loss has given the insurers credit for a certain amount received for salvage, he is not bound to prove that he did not receive more. *Lewis* v. *Eagle Ins. Co.* 508.

16. Under a policy which exempts the insurers from liability for any partial loss on certain goods perishable in their nature, unless it amount to seven per cent. and happen by stranding; and for partial loss on other goods or on the vessel or freight, unless it amount to five per cent.; the insurers are liable for a partial loss exceeding five per cent. on the freight of a cargo consisting of such perishable articles and of other goods, although not occasioned by stranding. *Lord* v. *Neptune Ins. Co.* 109.

17. Insurers on the freight of a ship for a voyage are not liable for a total loss, where there has been no total loss of the ship, and the goods could have arrived *in specie* at the port of destination; although the ship has been obliged by a peril insured against to put back to her port of departure, and the goods, after being damaged by that peril to the extent of more than half their value, or to the extent of goods yielding more than half the freight, have been sold there according to the interests of all parties except the insurers on freight. *Ib.*

18. If a ship is obliged by perils of the sea to put back to her port of departure, and her cargo is there sold by the master for the interest of all parties except the insurers on freight, the shipowner is not entitled to freight; and, if he defends, on a claim of freight, a suit brought against him by the owner of the cargo for the proceeds of such sale, he cannot recover from the underwriters on freight any part of the expenses of such defence. *Ib.*

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19. Insurers on freight are liable for the freight of goods jettisoned, without waiting for the adjustment of the general average; although the policy provides that any loss "shall be paid within sixty days after proof and adjustment thereof." *Ib.*

20. Under a policy of insurance on freight from Boston to San Francisco, and thence to port or ports in the East Indies and to a port of discharge in the United States, with liberty to return with a cargo of guano from the Chincha Islands instead of the East Indies, freight earned on the outward voyage is not to be deducted from the valuation in the policy, in computing a constructive total loss of freight on the passage from the Chincha Islands home. *Thwing* v. *Washington Ins. Co.* 443.

21. The condemnation and sale of a ship at an intermediate port, in consequence of damages sustained by perils insured against, entitle the owner to abandon and claim for a total loss of the freight, although the cargo has been carried to its destination in another vessel for a price equal to the freight which would have been paid if the original ship had completed her voyage and delivered her cargo and the stipulated freight has been paid by the consignees. *Ib.*

22. It is a sufficient abandonment of a ship injured by perils of the sea, and therefore surveyed and condemned on the west coast of the United States, in time of peace, to state in a notice to the underwriters that the assured "having received information of the condemnation of" the ship "at Humboldt, California, hereby abandons all in said vessel insured by" their policy "and claims as for a total loss." *Heebner* v. *Eagle Ins. Co.* 131.

23. A letter of abandonment of a vessel upon the ground that, in consequence of sea perils, "being found irreparable on survey, she was condemned and sold," sufficiently states the cause of abandonment, if the vessel was so much damaged that the costs of repair would exceed half her value, deducting one third new for old. *Perkins* v. *Augusta Ins. & Banking Co.* 312.

24. A letter from the master of a ship to the owner, stating that she had been surveyed and condemned on account of the expense of repairs, but not stating the cause of her injuries, was sent by the owner to the underwriters with a letter of abandonment, which they declined to accept. The owner afterwards, within thirty days after receiving the master's letter, and immediately after the master's return, called with the master upon the underwriters, exhibited to them the protest and the survey, and claimed a total loss. The protest stated that the vessel met with strong breezes and a heavy sea, and was with difficulty pumped free of water, and, the leak continuing the same, anchored; and the survey declared that she was incapable of proceeding to sea unless recaulked and recoppered, and that the cost of repairs with incidental charges would exceed her value. *Held*, that the abandonment was sufficient. *Thwing* v. *Washington Ins. Co.* 443.

See EVIDENCE, 16-18, 24-26; PLEADING, 6.

INSURANCE COMPANY.

The holder of a policy of insurance, made by a stock company when under ha-

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bility for losses to an amount equal to their capital stock, cannot maintain an action on the Rev. Sts. *c.* 37, § 18, against the directors for a loss under his policy, without first recovering a judgment against the company, fixing the amount of the loss. *Kinsley* v. *Rice*, 325.

See MUTUAL INSURANCE COMPANY.

INTEREST.

See INSOLVENT DEBTORS, 7; JUDGMENT, 2; SHIPS AND SHIPPING, 2.

JUDGMENT.

1. After judgment has been rendered in the superior court, and exceptions allowed, though not entered in this court, the superior court cannot enter final judgment; but the original judgment may be affirmed by this court on complaint under the Rev. Sts. *c.* 82, § 14. *Gassett* v. *Cottle*, 375.
2. A judgment for the plaintiff in an action to recover an instalment of interest on a promissory note, in defence to which want of consideration is relied on, is conclusive evidence of consideration in a subsequent action between the same parties to recover the principal of the note. *Black River Savings Bank* v. *Edwards*, 387.
3. A verdict and judgment against a city, in an action for personal injuries occasioned by a defect within the limits of a highway, are conclusive evidence in a subsequent action by the city against a tenant of the land (who had notice of the pendency of the former action and of the city's intention to hold him responsible for all damages recovered therein, and had opportunity to furnish evidence, and testified at the trial, although he was not requested to and did not take upon himself the defence of that action) that the highway was defective, that the person was injured there, while using due care, and of the amount of the injury; but not of the tenant's liability to keep the place in repair, nor of his having neglected to do so, nor of such negligence having been the sole cause of the injury. *City of Boston* v. *Worthington*, 496.
4. A judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such nonperformance. *O'Connor* v. *Varney*, 231.

See ARBITRAMENT AND AWARD; EVIDENCE, 15; INSURANCE COMPANY; SERVICE OF WRIT, 1, 2.

JURISDICTION.

See EQUITY, 1; PLEADING, 3; SERVICE OF WRIT; TRUSTEE PROCESS, 3.

JURY.

1. Whether it is ground for setting aside a verdict, that one of the jurors was not an inhabitant of the county, and that this was not known before verdict to the party against whom the verdict was rendered — *quære*. *Commonwealth* v. *Jenkins*, 485.

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2. Since the *St.* of 1855, *c.* 152, as well as before, the jury in a criminal case are to be governed by the instructions of the court in matter of law. *Commonwealth* v. *Rock*, 4.

See APPEAL; EXCEPTIONS, 2.

LANDLORD AND TENANT.

1. In an action to recover rent, the plaintiff counted on a lease to the defendant, an assignment thereof from the lessor to the plaintiff, notified to the defendant, and the defendant's consequent liability to him for use and occupation; and introduced evidence, without objection, that the defendant assented to such assignment, and afterwards attorned and paid rent to him. *Held*, after verdict for the plaintiff, that the defendant could not object to the variance between the declaration and the proof. *Fuller* v. *Ruby*, 285.

2. A lessee's covenant "to pay all taxes or duties levied or to be levied" on the premises during the term does not bind him to repay the expenses of paving the sidewalk in front of the premises, required of the lessor by the town under authority of a statute. *Twycross* v. *Fitchburg Railroad*, 293.

3. If a lease contains a covenant not to underlet or permit any other person to occupy without the lessor's assent, and that any breach of the lessee's covenants shall terminate his estate therein; an agreement of the lessee to assign the demised premises for the residue of the term is not complied with by an assignment duly executed by him, but not assented to by his lessor. *Austin* v. *Harris*, 296.

4. A covenant in a lease "that no alteration or addition shall be made in or to the premises without the consent of the lessor" does not relieve the lessee from liability for injuries resulting to a third person from want of repair of the premises. *City of Boston* v. *Worthington*, 496.

5. Notice to a tenant at will that his landlord has made a lease of the premises to another person need not state that such lease is in writing. *Mizner* v. *Munroe*, 290.

6. The authority of an attorney by whom a notice to a tenant at will that his landlord has leased the premises to another is signed need not be known to the tenant. *Ib.*

7. Whether the eviction of a tenant by his landlord from part of the demised premises suspends the entire rent — *quære*. *Fuller* v. *Ruby*, 285.

8. Interruption by a landlord of his tenant's occupation, without evicting him, does not suspend the rent, either in whole or in part. *Ib.*

LARCENY.

1. An indictment for larceny of property pledged and in the possession of the pledgee may describe it as the property and in the possession of the pledgor. *Commonwealth* v. *O'Hara*, 469.

2. An indictment for stealing bank bills sufficiently describes them as "sundry bank bills, of some banks respectively to the said jurors unknown, of the

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amount and value in all of thirty eight dollars, of the property, goods and chattels" of a person named. *Commonwealth* v. *Grimes*, 470.

See EVIDENCE, 3.

LEASE.

See LANDLORD AND TENANT.

LICENSE TO SELL REAL ESTATE.

See EXECUTOR AND ADMINISTRATOR.

LIEN.

1. A mechanic who has agreed to repair and alter stereotype plates, in consideration of being allowed to do the owner's printing for an indefinite time, has no lien on the plates on account of repairs and alterations, when, after several years, the owner withdraws the printing from him. *Stickney* v. *Allen*, 352.
2. A lien for work done on chattels is lost by voluntarily surrendering the possession of them to the owner or his agent. *Ib.*

See MECHANICS' LIEN; SHIPS AND SHIPPING, 2; TENDER, 2.

LIFE INSURANCE.

See INSURANCE, II.

LIGHT AND AIR.

By the law of Massachusetts, before *St.* 1852, *c.* 144, the mere uninterrupted continuance for more than twenty years of a window with a projecting sill, overlooking the land of another, did not necessarily create any easement of light or air. *Rogers* v. *Sawin*, 376.

LIMITATIONS, STATUTE OF.

1. A claim against an administrator, for services performed for his intestate's estate while under his charge, is not taken out of the statute of limitations by a letter from the administrator to the creditor, saying: "On reflection, I do not think what labor you performed for the estate would be worth $100. Most of your labor was directly for or on account of the widow. My impression is, that you could not collect directly of me, as administrator, anything. It must be done through the widow. I do not mention this legal objection to get rid of anything, but to direct you in settlement with the widow. When the matter comes up, I shall be disposed to do what is right and just. I think you had better do something at once towards settlement with the widow, as I want to square up things all round." *Rhoades* v. *Allen*, 35.
2. The *St.* of 1855, c. 283, excepting from the operation of the *St.* of 1852, *c.* 294, § 1, (which limited the time of bringing actions against executors and administrators to two years from the filing of their official bond,) any right which had accrued or existed against any deceased person or his executor or

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administrator prior to its passage, does not revive a right of action barred by the *St.* of 1852 before the passage of the *St.* of 1855. *Page* v. *Melvin*, 208.

3. A remainderman, during the continuance of the life estate, is under "legal disability" within the meaning of *St.* 1817, c. 190, § 12, so that he may bring an action within five years after the termination of the life estate to recover land sold and conveyed by an executor under a license, more than five years before the commencement of the action. *Jewett* v. *Jewett*, 31.

LOAN FUND ASSOCIATION.

1. Under a by-law of a loan fund association, providing that "in case any member by reason of sickness or removal, or through misfortune, is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association; and in case the directors are satisfied as to the grounds of withdrawal, his whole amount of subscription shall be returned except the entrance fee;" and that "any person wishing to withdraw for the above reasons or otherwise," and who shall have been a member for a certain time, "and be clear of the books," shall be entitled to a certain interest on that amount; any person having been a member for that time, and "clear of the books," may withdraw without leave of the directors. *Fuller* v. *Salem & Danvers Loan & Fund Association*, 94.
2. The *St.* of 1854, *c.* 454, § 5, conferring on this court jurisdiction in equity of all disputes between loan fund associations and their members, does not affect the right of any member to sue the association at law. *Ib.*

LORD'S DAY.

See INSURANCE, 5.

LUMBER.

See SALE.

MANUFACTURING CORPORATION.

1. A manufacturing corporation under the laws of this commonwealth cannot form a partnership with an individual. *Whittenton Mills* v. *Upton*, 582.
2. A manufacturing corporation and an individual who have actually made a contract of partnership, and, either with or without the assent of all the stockholders of the corporation, acted and held themselves out to third persons as partners for many years, and contracted debts as such, cannot, upon the petition of such individual, be put into insolvency as a partnership, under *Sts.* 1838, *c.* 163, and 1851, *c.* 327; and proceedings in insolvency so instituted will be suspended by this court upon the application of the corporation. *Ib.*
3. *It seems*, that the payment of dividends and preferred debts in insolvency out of the estate of a manufacturing corporation does not diminish the liability of its directors under the Rev. Sts. c. 38, § 25, for the excess of its debts over its capital stock. *Merchants' Bank* v. *Stevenson*, 232.
4. The liability of directors of a manufacturing corporation under the Rev. Sts. c. 38, §§ 25, 29, 31, for the excess of its debts over its capital stock, must be

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enforced by bill in equity, and not by action at law, if the debts for which the directors are so liable amount to more than such excess. *Ib.*

See INSOLVENT DEBTORS, 2.

MAYOR AND ALDERMEN.

See HOUSE OF REPRESENTATIVES.

MASTER AND SERVANT.

1. In an action by a servant against his master for injuries sustained from the explosion of a steam boiler used in his business, the plaintiff introduced evidence without objection that there was no such fusible safety plug on the boiler, as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug; and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover; and refused to instruct them that if the defendant used all the appliances for safety, that were ordinarily used in such establishments as his, he was not liable in respect to this boiler, although he did not use the fusible plug. *Held*, that the defendant had no ground of exception. *Cayzer* v. *Taylor*, 274.
2. Ordinary care must be measured by the character and risks and exposures of the business; and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases. *Ib.*
3. A master is responsible to his servant for injuries occasioned by the negligence of an incompetent fellow-servant, knowingly or negligently employed by the master. *Ib.*
4. A master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow-servant contributes to the accident. *Ib.*

MECHANICS' LIEN.

Under *St.* 1855, *c.* 231, giving a lien upon ships for labor or materials, to be enforced by petition to the court of common pleas "in the manner provided by" the Rev. Sts. *c.* 117, §§ 4 *& seq.*, a petition cannot be filed until the debt sought to be secured has remained unpaid sixty days after it has been payable, as provided by the Rev. Sts. *c.* 117, § 4, in case of liens on buildings. *Tyler* v. *Currier*, 54.

MILITIA.

See CORPORATION, 1.

MONEY HAD AND RECEIVED.

See BANK.

MORTGAGE.

I. *Of Real Estate.*

See EQUITY, 2; EVIDENCE, 15; RAILROAD, 2, 3.

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II. *Of Personal Property.*

1. A mortgage of leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor. *Putnam* v. *Cushing*, 334.
2. A mortgagee of chattels may maintain replevin for them after their attachment by trustee process against the mortgagor, without making the demand required by Rev. Sts. *c.* 90, §§ 78, 79. *Ib.*
3. A notice, signed by a mortgagee of personal property, and delivered to a deputy sheriff who has attached the property on a writ against the mortgagor, is sufficient, under Rev. Sts. *c.* 90, § 79, if it notifies him to deliver up the property, and describes the mortgage and the notes secured thereby, although it does not contain an express demand of payment. *Brewster* v. *Bailey*, 37.
4. A demand of payment under Rev. Sts. *c.* 90, § 79, by a mortgagee of personal property on an attaching officer, may state the full amount of the debt, without deducting what the mortgagor might deduct on the ground of a usurious consideration. *Ib.*

See ESTOPPEL; EVIDENCE, 14; PAYMENT; RAILROAD, 2, 3; SHIPS AND SHIPPING, 1.

MUTUAL INSURANCE COMPANY.

1. The record of losses kept by a mutual insurance company is sufficient *prima facie* evidence that such losses have occurred, in an action to recover an assessment laid upon the members. *People's Mutual Ins. Co.* v. *Allen*, 297.
2. An assessment by a mutual insurance company is valid that is based upon a computation of the losses from month to month, and includes in the losses chargeable upon each policy all those of the entire month in which it expires, excluding those of the month in which it began. *Ib.*
3. A premium note, payable in such portions and "at such times as the directors may agreeably to their by-laws require, to a mutual insurance company, whose by-laws provide that the deposit note shall be double the premium, and "that on all policies for less than a year the deposit note may be for such a sum as the president may determine;" and which has issued such policies, with a deposit note of one dollar and a premium paid of a larger sum; is not invalidated by a slight disproportion, occasioned by laying an assessment on the deposit notes only, instead of the amount of the premiums and deposit notes. *Ib.*
4. An assessment by a mutual insurance company is not invalid because it is made to cover losses occasioned by bad investments; nor because it is laid in place of a previous illegal assessment which the directors have not enforced nor because in consequence thereof it has been delayed for some months. *Ib.*

See PROMISSORY NOTE, 8, 9.

NAME.

See INDICTMENT, 3.

NEGLIGENCE.

See JUDGMENT, 3; MASTER AND SERVANT.

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NOTICE.

See JUDGMENT, 3; POOR DEBTORS, 1; SCHOOL HOUSE, 2; SERVICE OF WRIT, 2.

NUISANCE.

1. An indictment for a nuisance by keeping and maintaining "a tenement" in a certain street and city, used in a manner prohibited by *St.* 1855, *c.* 405, need not more particularly describe the place so used. *Commonwealth* v. *Skelley*, 464.
2. An indictment, which avers that the defendants, on a day named and on divers other days and times between that and another day, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, by them used and kept as a house of ill fame, and resorted to for the purpose of prostitution and lewdness; and for their own lucre and gain, certain persons, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together, did unlawfully and wilfully cause, permit and procure, and, as well in the night as in the day, did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens; sufficiently states a nuisance under *St.* 1855, *c.* 405; and is not bad for duplicity as stating also the common law offence of keeping a disorderly house. *Commonwealth* v. *Hart*, 465.
3. On the trial of an indictment on *St.* 1855, *c.* 405, for keeping a building used in the manner declared by that statute to be a common nuisance, no proof is required of the allegation in the indictment of the building's "being a common nuisance to the great injury and common nuisance of all the peaceable citizens." *Commonwealth* v. *Buxton*, 9.

OFFICER.

See ARREST; ESTOPPEL; EVIDENCE, 15; SPIRITUOUS AND INTOXICATING LIQUORS, 5.

ORDER.

See DAMAGES, 1; PLEADING, 5.

PARISHES AND RELIGIOUS SOCIETIES.

See TRUST, 5.

PARTITION.

See EQUITY, 3; FLATS.

PARTNERSHIP.

1. A partner, who upon the dissolution of the partnership has received all the partnership assets, and agreed to apply them to the payment of the outstanding debts, for which they are sufficient, is not liable to an action at law by his

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copartner, for the amount of a partnership debt, which he has been obliged to pay, without showing a final settlement of the partnership business, or that there are no other debts outstanding. *Shattuck* v. *Lawson*, 405.

2. An agreement of a partner with his copartner upon the dissolution of the partnership, to apply to the best of his judgment the partnership assets towards its outstanding debts, will not support a declaration alleging that the defendant agreed to pay all the outstanding debts of the partnership, and neglected and refused to do so. And the defendant may avail himself of this variance under an answer admitting the execution of the agreement (a copy of which is annexed to the declaration) and denying all the other allegations of the plaintiff *Ib.*

3. In the absence of any special agreement or usage, one partowner of a ship, who has contributed with the others, in proportion to their interests, to her outfit for a whaling voyage, is not liable, while the adventure is unfinished, to an action at law for his proportion of the amount of a bill of exchange drawn by the master in a foreign port upon the managing owner and paid by him; and such liability is not therefore the subject of a set-off in an action at law. *Starbuck* v. *Shaw*, 492.

See INSOLVENT DEBTORS, 5–7; INSURANCE, 1; MANUFACTURING CORPORATION, 1, 2; TAX; TRUST, 1.

PAYMENT.

An agreement between the maker and the payee of a promissory note, that it shall be deemed to be paid by being allowed in discharge of a mortgage from the payee to a third person, cannot have that effect without the assent of that person. *Hewes* v. *Hanscom*, 336.

See EVIDENCE, 15.

PERPETUITY.

See TRUST, 5.

PLEADING.

I. *Parties to Actions.*

See HUSBAND AND WIFE, 4; INSOLVENT DEBTORS, 1; PRINCIPAL AND AGENT, 1.

II. *Declaration.*

See DAMAGES, 6; LANDLORD AND TENANT, 1; PARTNERSHIP, 2; SLANDER.

III. *Answer, Demurrer, &c.*

1. The objection that one of the plaintiffs in an action brought by trustees had not accepted the trust at the date of the writ, cannot first be taken at the argument before the full court upon the report of one of the judges. *Henshaw* v *Bank of Bellows Falls*, 568.

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2. Nonjoinder of a defendant in an action of contract can be pleaded in abatement only. *Shelton* v. *Banks*, 401.

3. The objection that a transitory action brought by a citizen of another state is not brought in the county of the defendant's residence or place of business, as required by *St.* 1856, *c.* 70, cannot be first taken after verdict. *Barry* v. *Page*, 398.

4. The incorporation of defendants sued as a corporation may be denied after they have appeared generally and filed an affidavit of merits. *Greenwood* v. *Lake Shore Railroad*, 373.

5. In an action upon an order to deliver stock, if the declaration alleges a demand according to the tenor of the order, the want of any demand cannot be taken advantage of under an answer which only denies the existence and acceptance of the order. *Eastern Railroad* v. *Benedict*, 212.

6. In an action on a policy of insurance, under an answer alleging a false and fraudulent representation by the assured of the value of the vessel insured, the defendants may prove a false, though not fraudulent, representation. *Lewis* v. *Eagle Ins. Co.* 508.

7. *It seems*, that under the *St.* of 1852, *c.* 312, a demurrer to part of one count in a declaration is admissible, even if the matters alleged are divisible in their nature. But if admissible, it goes merely to the manner of stating the cause of action and cannot be argued before the full court, until the whole case has been tried by a single judge. *Minturn* v. *Manufacturers' Ins. Co.* 501.

See PARTNERSHIP, 2.

POOR DEBTORS.

1. If notice of an intention to take the poor debtors' oath is served upon the creditor less than a mile from the place of examination, the time allowed him for travel under *St.* 1855, *c.* 444, § 4, need only be a proportionate fraction of an hour. *Jacot* v. *Wyatt*, 236.

2. A poor debtor who has, pursuant to *St.* 1855, *c.* 444, entered into a recognizance to deliver himself up within ninety days for examination, giving notice to his creditor and making no default, and to abide the final order of the magistrate, and who does attend before the magistrate, is not bound to surrender himself to the officer until the magistrate has certified a refusal to admit him to the poor debtors' oath. *Ib.*

3. A magistrate's refusal of an application to be admitted to take the poor debtors' oath, under *St.* 1857, *c.* 141, upon the ground that the debtor has property, is conclusive; and an appeal taken from the decision of the magistrate finding him guilty upon charges of fraud filed at the same time does not exempt him from arrest on the execution. *Fletcher* v. *Bartlett*, 491.

See BAIL, 2; EVIDENCE, 13; INSOLVENT DEBTORS, 1.

POWER.

See TRUST, 3, 4.

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PRINCIPAL AND AGENT.

1. A foreign principal may maintain an action in his own name for goods sold by his agent here, although no agency is disclosed at the time of the sale. *Barry* v. *Paige*, 398.

2. A factor, who takes a promissory note for goods sold on account of his consignor, and gives him reasonable notice of this and of the subsequent insolvency of the purchaser, does not, by proving the note under the insolvent laws and taking a dividend thereon, render himself liable for the full amount of the note, if he uses reasonable care and skill; although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency. *Gorman* v. *Wheeler*, 362.

See BANK; EMBEZZLEMENT; EVIDENCE, 21; LANDLORD AND TENANT, 5, 6; PROMISSORY NOTE, 6; SHIPS AND SHIPPING, 2.

PROBATE COURT.

See EXECUTOR AND ADMINISTRATOR.

PROMISSORY NOTE.

1. A promissory note, given by a widow to a creditor of her deceased husband for the amount of his debt, is void for want of consideration, if the husband has left no estate or assets, though the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate by the note. *Williams* v. *Nichols*, 83.

2. The presentment of a promissory note at the place of its date is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere. *Smith* v. *Philbrick*, 252.

3. In an action by an indorsee against the maker of a negotiable promissory note, indorsed by the payee in blank, to which the defence is failure of consideration, the presumption is that it was transferred to the plaintiff on the day of its date, unless the defendant shows that the note was indorsed after maturity, or remained the property of the payee after the indorsement. *Noxon* v. *De Wolf*, 348.

4. In an action by an indorsee against the maker of a negotiable promissory note, payable at a future day, and indorsed in blank by the payee, the judge refused to instruct the jury that "the burden of proof, the evidence being contradictory, was on the plaintiff to show that the note was discounted by him before it became due;" and instructed them that "if the plaintiff discounted the notes before they were due, and for a valuable consideration, in good faith, he was entitled to recover," and that "the presumption from the notes themselves was that they were indorsed on the day of their date; and if they were shown to have been in the hands of the payee after that time and before they were due, the presumption continued that the indorsement was made after the time when they were thus shown to be in the hands of the payee, and before they were due; and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff

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after they were due, or that they remained the property of the payee." The defendant did not specifically except to this instruction, nor call the attention of the court to the distinction between *prima facie* evidence and changing the burden of proof. *Held*, that he had no ground of exception. *Ib.*

5. In an action upon a promissory note, the consideration of which was denied by the defendant, the judge instructed the jury that the burden was on the plaintiff to establish a consideration, and did not shift upon the defendant; that the note, containing the words "value received," in law imported a consideration, and upon the evidence of the note itself the plaintiff would be entitled to recover, unless there was some other evidence to affect it; yet the burden was upon the plaintiff to satisfy the jury upon all the evidence and by the preponderance of evidence that there was a consideration; that if the jury could not say upon all the evidence whether the testimony introduced was true, or so much was true as to affect the credit to be given to the note, the note would enable the plaintiff to recover; and that if the defendant did not himself receive the consideration, the note was still *prima facie* evidence of a consideration. *Held*, that the defendant had no ground of exception. *Black River Savings Bank* v. *Edwards*, 387.

6. In an action by a corporation upon a promissory note payable to them and received by their treasurer, the judge refused to instruct the jury that to constitute a consideration it must be shown that the defendant had some value therefor, or that the plaintiffs, at the time of making it, intentionally, and as the consideration of the note, and at the defendant's request, agreed to do or did some act believed to be prejudicial to themselves; and also refused to instruct the jury that, as the plaintiffs adopted the note, they adopted it in all respects, according to the understanding and agreement of their treasurer and the defendant, and affected by the knowledge of all the facts known to them, and if as between them it was without value and for the accommodation of the plaintiffs, then, whatever uses their treasurer made or intended to make of it, the plaintiffs could not recover; and instructed the jury that if the plaintiffs received some prejudice, at the request or procurement of the defendant, it was a sufficient consideration; and that if the defendant and the treasurer knew that the object of the note was to deceive the plaintiffs, or to obtain money for the treasurer from them, that was enough to create a consideration, if the money was obtained upon it accordingly from the plaintiffs. *Held*, that the defendant had no ground of exception. *Ib.*

7 In an action upon a promissory note payable to a bank, the jury were instructed that if no money was had by the defendant on the note, and yet was given by him to the plaintiffs' treasurer to aid him in getting money from the bank, and in concealing the condition of the bank, or to aid in any illegal transaction, or with reasonable cause to know that it would be so illegally used, and the money was accordingly obtained by the treasurer from the bank, the defendant would be estopped, because this would constitute no defence to the note, he being estopped to allege his own fraud. *Held*, that upon the facts supposed there would be no defence; and that the statement that the defendant would be estopped was immaterial. *Ib.*

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8. An accommodation indorser, before maturity, of a negotiable promissory note, given to a mutual insurance company for premiums, who has been obliged to pay the amount thereof to a subsequent indorsee, may recover the amount so paid of the maker, on a count for money paid; or, *it seems*, as indorsee of the note; although when he indorsed the note, the insurance company, as he knew, had become indebted to the maker for the amount of a loss larger than the amount of the note. *Barker* v. *Parker*, 339.

9. In an action by an indorsee against the maker of a negotiable promissory note, payable to an insurance company, and indorsed to the plaintiff before its maturity, claims against that company cannot be set off, although the indorsee knew that the note was given for premiums of insurance. *Barker* v. *Valentine*, 341.

See EVIDENCE, 5, 15; FORGERY; JUDGMENT, 2; MUTUAL INSURANCE COMPANY, 3, 4; PAYMENT; PRINCIPAL AND AGENT; WITNESS, 1

RAILROAD.

1. A railroad corporation incorporated by law in this state is not exempted from liability for the loss of goods delivered to it to be carried over part of its road to the state line, by having previously leased that part of its road to a corporation established by law in an adjoining state, whose road connects with it at the state line. *Langley* v. *Boston & Maine Railroad*, 103.

2. A railroad corporation, empowered by law to mortgage their franchise and property, after making a mortgage of all their lands, franchise and privileges, and "all the locomotive engines, cars and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use," authorized their directors to issue bonds to the amount of $1,200,000 to pay debts contracted in building and furnishing their road, and to secure such bonds by "an additional or second mortgage of the road, franchise and property of every description, including cars and engines," subject to the first mortgage, and "as full and complete" as that. Pursuant to this authority, bonds were issued, and a second mortgage made of all the lands, franchise and privileges of the corporation, "and the property and premises whatsoever mentioned, specified, described or referred unto in the" first mortgage. *Held*, that the second mortgage, as against a subsequent attachment, conveyed engines and cars acquired by the corporation after the first and before the second mortgage. *Henshaw* v. *Bank of Bellows Falls*, 568.

3. The president of a railroad corporation, authorized by vote of the corporation to execute and deliver, and "to do and perform all other acts and things necessary to give validity and effect to" a mortgage of the road, franchise and property of the corporation to trustees for the benefit of bondholders, executed upon the eve of the failure of the corporation, a deed of surrender of the whole road and property to the trustees, who, upon the failure of the corporation, took possession of the road and property, and afterwards kept exclusive management and control thereof. *Held*, that the trustees thereby obtained and kept actual possession of the property, good as against subsequent attaching

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creditors; although the laws of the State required not only delivery, but continuous and exclusive possession of the grantees, to perfect such a title; and although the trustees continued to employ in the management of the road the same persons who had been employed by the corporation; and although the mortgage provided that the trustees should permit the corporation to retain the exclusive use and possession of the property until some default in paying the principal or interest of the bonds, which had not yet occurred. *Ib.*

See EMBEZZLEMENT, 1, 2; EQUITY, 5.

RECEIVER OF STOLEN GOODS.

See EVIDENCE, 3.

REPLEVIN.

See MORTGAGE, 2.

REPRESENTATIVES.

See HOUSE OF REPRESENTATIVES.

RESERVATION.

See DEED, 4.

REVIEW.

1. Under Rev. Sts. *c.* 99, § 19, a review may be granted by the court of common pleas of a judgment of that court, affirming a judgment of a justice of the peace on the complaint of the defendant in review. *Anderson* v. *Brown*, 92.
2. On a writ of review of a judgment of the court of common pleas, affirming, on complaint of the defendant in review, a judgment of a justice of the peace, from which an appeal had been taken by the plaintiff in review, but not entered, the case must be tried on its merits, as if an appeal had been duly entered. *Ib.*
3. In a writ of review of a judgment of the court of common pleas, an omission to allege that the judgment was rendered on complaint of the defendant in review in affirmance of a judgment of a justice of the peace is no variance. *Ib.*

SALE.

1. The Rev. Sts. *c.* 28, § 154, requiring lumber to be surveyed before sale, do not apply to a sale in another state of lumber in this commonwealth. *Hardy* v. *Potter*, 89.
2. Testimony of a purchaser of lumber that he bought and paid for it in another state, the lumber being then in the custody of an agent of the seller in this state, to whom the seller promised to write; that nothing more was to be done between the seller and himself in relation to the sale; and that he afterwards saw it here; is sufficient evidence of a delivery to be submitted to the jury. *Ib.*

See INSOLVENT DEBTORS, 6.

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SCHOOL DISTRICT.

Any subdivision of one school district which has been altered within ten years is within the prohibition of *St.* 1849, *c.* 206, that "no town shall be districted anew for school purposes, so as to change the taxation of lands of proprietors into districts using different school-houses, oftener than once in ten years." *Gustin* v. *School District in Danvers*, 85.

SCHOOL-HOUSE.

1. A building committee of the selectmen of a town which had not been divided into territorial school districts selected a lot of land for a school-house, and, on the refusal of H., the owner, to sell it, applied to the selectmen to call a meeting of the town. At such a meeting, called "to see if the town will authorize the selectmen to select at their discretion a school-house lot," it was voted, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, from the land of H. heretofore selected by the town." *Held*, that this was not a sufficient designation of land by the town to authorize the selectmen to select out of it a school-house lot, under *St.* 1848, *c.* 237. *Harris* v. *Inhabitants of Marblehead*, 40.
2. *It seems*, that a notice that the selectmen, in accordance with a vote of the town, will on a certain day lay out and assess damages for the taking of a lot of land, but not stating that it is for a school-house, is insufficient. *Ib.*
3. A town which, against the owner's will, illegally takes a lot of land for a school-house lot, and erects a school-house thereon, cannot be allowed anything for betterments, under the Rev. Sts. *c.* 101, §§ 19, 20. *Ib.*

SCIRE FACIAS.

See EXECUTION; TRUSTEE PROCESS, 2, 3.

SEARCH WARRANT.

See SPIRITUOUS AND INTOXICATING LIQUORS, 5.

SEASHORE.

See FLATS.

SENTENCE.

See INDICTMENT, 4.

SERVICE OF WRIT.

1. *It seems*, that under the Rev. Sts. *cc.* 90, 92, no judgment can be rendered at the first term upon the default of a defendant who was out of the State at the time of the service of the summons, whether he has ever been an inhabitant of the State or not. *Thayer* v. *Tyler*, 164.
2. Under *St.* 1839, *c.* 156, judgment cannot be rendered against a foreign corporation, without such notice as is provided by the Rev. Sts. *c.* 92. *Ib.*
3. Service of process upon a foreign insurance company who have appointed an

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attorney in this commonwealth to accept service of process against them, as required by *St.* 1851, *c.* 331, must be made upon him. *Ib.*

See TRUSTEE PROCESS, 3.

SET-OFF.

See PARTNERSHIP, 3; PROMISSORY NOTE, 9.

SHIPS AND SHIPPING.

1 Under the U. S. St. of 1850, *c.* 27, requiring every mortgage or conveyance of any vessel or part of a vessel to "be recorded in the office of the collector of customs where such vessel is registered or enrolled," the record must be made in the district of the last registry and enrolment, though not the home port of the vessel; and a mortgage not so recorded conveys no title as against an attaching creditor of the mortgagor, although his attachment is not made until after the mortgagee has taken possession for breach of condition of his mortgage. *Potter* v. *Irish*, 416.

2. By a charter party of a vessel for a voyage from New York to Charleston, and thence to Liverpool, the master and partowner agreed to victual and man the vessel and keep her in good condition, and the charterer agreed to furnish her with a full cargo of cotton at Charleston and to pay a certain freight on delivery of the cotton in Liverpool; the vessel was to be consigned to the charterer's friends in Charleston, and to their agents in Liverpool; and what money the master might require for the ship's disbursements in Charleston was to be advanced to him, and paid by his bill of exchange on the freight. The vessel was laden at Charleston, and the master drew a bill accordingly on the said agents at Liverpool, and by letter requested them to accept the same and to insure the amount on account of the owners of the vessel. The vessel on her arrival at Liverpool was committed to said agents, and they paid the disbursements, delivered a portion of the cargo and collected part of the freight, and then became bankrupt. The master collected the rest of the freight himself, and paid the bill of exchange which he had drawn on them. *Held*, that drawing the bill on the consignees at Liverpool did not make them the master's agents to collect freight; that he had a lien on the freight for the charter money, and was entitled to retain from the amount collected by him the whole of the charter money, after deducting the ship's disbursements at Liverpool. *Welch* v. *McClintock*, 215.

3. Merchandise was shipped under an agreement between the shippers and the shipowner that it should be carried around Cape Horn or elsewhere for a market, and the net proceeds, deducting charges and master's commission on sales, invested in specie or bullion and shipped to the United States or Canton; if to Canton, to be invested in such goods as the shippers might direct, to be shipped to Boston, subject to a deduction of the usual charges, and on their arrival in Boston to be sold by auction, and, after deducting from the net proceeds the original cost and all charges except premiums of insurance and interest on the money, "the residue or profits to be equally divided between the shipper and

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shipowner." The ship went around Cape Horn, and the master sold the cargo in Chili and Peru for specie, part of which was forcibly taken from him by the government of Chili, then at war with Spain; and, being unable for want of funds to proceed to China at once, traded along the coast, and afterwards went to Canton, invested the remaining proceeds of the outward cargo and other funds in a cargo for Peru, went to Peru, and there sold it for specie, part of which he remitted to Boston, where it was distributed among the shippers, and the residue with the brig were seized and appropriated by the Chilian government, who many years afterwards, under treaty with the United States, paid about two thirds of the cost of the original cargo, with interest from the time of seizure. *Held*, that the owner of the ship was not entitled to any portion of the money paid by Chili, although, including the interest, it exceeded the original cost of the goods; nor of the money sent home by the captain from Peru, without proof of the terms upon which the goods were shipped from Canton to Peru. *Cabot* v. *Amory*, 428.

See INSURANCE, 18; PARTNERSHIP, 3; TAX.

SLANDER.

A declaration in slander for charging the plaintiff with being "a whore and a common prostitute" is not supported by proof of other words amounting to a general charge of unchastity. *Doherty* v. *Brown*, 250.

SPECIFIC PERFORMANCE.

See EQUITY, 5.

SPIRITUOUS AND INTOXICATING LIQUORS.

1. Under the *St.* of 1852, *c.* 322, § 14, intoxicating liquors may be sold by any person, though not himself the importer, in the original unbroken packages in which they were imported, and in quantities not less than those prescribed by the laws of the United States. *Bradford* v. *Stevens*, 379.

2. Upon the trial of an indictment on *St.* 1855, *c.* 215, §§ 15, 17, for selling intoxicating liquors "without having any license, appointment or authority therefor," the Commonwealth need not prove that the defendant did not when that statute took effect own the liquors sold by him. *Commonwealth* v. *Murphy*, 1.

3. The fifteenth and seventeenth sections of the *St.* 1855, *c.* 215, are constitutional and valid. *Ib.*

4. One indicted on *St.* 1855, *c.* 215, § 17, for being a common seller of intoxicating liquors, cannot except to a refusal of the presiding judge to rule that, if that statute provides for a trial contrary to the course and usage of the common law, it is unconstitutional and no verdict should be found under it. *Commonwealth* v. *Rock*, 4.

5. An officer seizing, under a search warrant duly issued for intoxicating liquors,

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liquors not described in the warrant, is liable to an action by the owner thereof, notwithstanding *St.* 1855, *c.* 215, § 38. *Arthur* v. *Flanders*, 107.

See NUISANCE; WITNESS, 5.

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See EQUITY, 4; LIMITATIONS, 2.

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TAX.

Under the Rev. Sts. c. 7, § 13, and *St.* 1839, c. 139, § 2, ships belonging to a partnership and employed in its business are to be taxed to the partners jointly in the town where their business is carried on, and not separately at their places of residence. *Peabody* v. *County Commissioners*, 97.

See LANDLORD AND TENANT, 2; SCHOOL DISTRICT.

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TENANT IN COMMON.

See DEED, 3; EQUITY, 3.

TENDER.

1. A tender of the amount of a debt without costs is insufficient, after a writ has been sued out thereon, and sent to an officer for service, although not yet actually delivered to him. *Emerson* v. *White*, 351.
2. An owner of stereotype plates in the possession of a mechanic who refuses to give them up, except on payment of a bill due for printing, and also of a bill for repairs on the plates, which is not due, is not bound to tender payment of the bill already due, if he is ready to pay it on the delivery to him of the plates. *Stickney* v. *Allen*, 352.

TIME.

See INSURANCE, 5; POOR DEBTORS, 1.

TOWN.

See JUDGMENT, 3; SCHOOL HOUSE; TRUST, 5.

TRESPASS.

See ACTION; ESTOPPEL; HUSBAND AND WIFE, 4; DAMAGES, 6.

TROVER.

See ACTION; DAMAGES, 3–5.

TRUST.

1. L. and M. purchased real estate and had it conveyed to L., who furnished the purchase money; and L. wrote to an attorney the following letter: "The agreement between M. and myself is simply this: We have purchased an estate" (describing it) "which has by mutual consent been conveyed to me, I having paid and secured the purchase money. Whatever disposition is made of the property, the profit and loss are to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect." L. afterwards, with M.'s assent, divided the estate into lots, and sold them, and died insolvent. *Held*, that the letter of L., having been acted on by the parties, was evidence of a trust or a partnership, and sufficient to satisfy the statute of frauds; that the lots sold vested in the purchasers discharged of any trust; but that any mortgages taken back by L. upon sales were part of the trust fund. *Montague* v. *Hayes*, 609.
2. Under a will which declares that all moneys paid as and for dividends on shares in any corporation held by trustees under the will "shall be deemed and taken to be income and be appropriated as income according to the provisions of my will, excepting such dividends as shall be made and declared expressly as dividends of capital," *cestuis que trust* for life are entitled to dividends on shares in a wharf corporation, of profits arising from purchasing

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land, filling up flats, laying out streets, and erecting, leasing and selling warehouses, although in part consisting of proceeds from the sales of real estate of the corporation, if it does not appear that the capital or the value of the shares has been thereby diminished; and even, *it seems*, if it does so appear. *Balch* v. *Hallet*, 402.

3. The execution of a power, affected by a trust for the benefit of children and their issue, to which the consent of a majority of the children living at the time of executing it is made necessary by the will creating the power, is valid in equity without such consent, if the children are all dead at that time. *Leed* v. *Wakefield*, 514.

4. A testator, who left a wife, three sons and a daughter, devised the rents and profits of real estate to his wife during her life, and, in case she should die before all his children should be of age, directed his executor to take possession of the estate and, as long as any of the children should be under age, appropriate the income to their support, "and as soon as all my children shall have come of age (their mother being dead) my said executor shall proceed to sell and dispose of my said estates, consulting and advising however with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sale," and distribute the proceeds among the four children equally, giving the share of any child who should be dead to its lawful issue, or, if there should be no such issue, to the surviving children equally; and further, if the wife should not die till all the children should be of age, take possession of the estate and proceed to sell it "in the same way and under the same limitations, and distribute the proceeds thereof in the same manner as is above provided in the case of my wife's dying before all my children shall have come of age." All the children came of age and died in the wife's lifetime; all without issue, except one son, who left a child; the daughter conveyed her interest before her death; at the widow's death, the executor sold the real estate. *Held*, that the daughter's interest was either contingent, or, if vested, was devested by the execution of the power, and in either case her grantee had no interest in the proceeds of the sale. *Ib.*

5. A testator devised his farm to the selectmen of a town "and their successors in office forever," in trust "yearly and every year to appropriate and pay all the rents, incomes and profits of the said farm for the support of a gospel minister or ministers in said town, of the Congregational denomination; the said selectmen to be always accountable to said town, and to render to said town annually, and as much oftener as said town may require, a true and faithful account of all their proceedings relative to said farm;" "subject however to these directions and restrictions:" that in case of strip or waste, or of misappropriating any part of the income, or of the selectmen's refusal or neglect to render an account to the town, then the two oldest persons in the nearest degree of kindred to the testator within the county might proceed to settle the matter by submission to arbitration, and, if the selectmen should neglect for six months to pay to said kindred any sum awarded, "the said two of my said kindred shall forthwith take possession of my said farm; and the said farm shall descend thenceforward to them, in equal shares, to have and to hold the

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same to them and their heirs and assigns forever; and the term of said selectmen and of said town in said farm shall thenceforward and forever cease and expire." At the time of the execution of the will there was but one religious society in the town. *Held*, that this devise was not for the benefit of the Congregational minister or ministers in the town, but for the benefit of the inhabitants of the town in their parochial capacity, and, upon their subsequent legal organization as a separate corporation, in trust for the parish; that the selectmen took an estate in fee, and not a life estate upon condition; that the executory devise to the testator's next of kin was void as tending to create a perpetuity; that the legislature might provide by law for the election of new trustees by the parish; and that a sale by such trustees, under license granted by this court, pursuant to *St.* 1846, *c.* 244, passed a good title as against all parties. *Wells* v. *Heath*, 17.

See EQUITY, 1, 2; PLEADING, 1; WILL.

TRUSTEE PROCESS.

1. An attachment by trustee process against a foreign corporation is defeated by a certificate of discharge of the trustee in insolvency. *Pingree* v. *Hudson River Ins. Co.* 170.
2. On *scire facias* against a trustee in foreign attachment, the defendant cannot avail himself for the first time of the objection that the money in his hands is due from him jointly with another person, upon whom no service was made, although he was named in the original writ; even if the money has since been attached by another person. *Hoyt* v. *Robinson*, 371.
3. A trustee in foreign attachment may object on *scire facias* that judgment was rendered in the original action at the first term against the principal defendant, who was not in the State at the time of service, without giving the further notice required by statute in such cases. *Thayer* v. *Tyler*, 164.

USURY.

See MORTGAGE, 4; WITNESS, 1.

VARIANCE.

See INDICTMENT, 2, 3; LANDLORD AND TENANT, 1; PARTNERSHIP, 2; REVIEW, 3; SLANDER.

VENUE.

See PLEADING, 8.

VERDICT.

Upon an indictment for a felonious assault by shooting with a pistol with intent to murder, the jury returned a verdict of "guilty of the assault and battery as charged, but without the felonious intent." *Held*, that this verdict might be amended by the court during the same sitting by striking out the words "and battery;" and, thus amended, was sufficient. *Commonwealth* v. *Lang*, 11.

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WATERCOURSE.

See EASEMENT.

WAY

1. A grant of "liberty to pass and repass over my land where it is necessary, confers a right of way to and from those lands only which the grantee owns at the date of the deed; and the burden of proof is on him and those claiming under him, if sued as trespassers, to show what those lands were. *Smith* v. *Porter*, 66.
2. The owner of a right of way over a passage way may, for the purpose of keeping the way fit for use, disturb the soil and pave or repair it, making no material change in its condition, nor interfering with the estates of others in the way. *Brown* v. *Stone*, 61.

See DEED, 2; EVIDENCE, 19–21; JUDGMENT, 3; LANDLORD AND TENANT, 2.

WILL.

A testator devised real estate to his grandson in fee; and by a codicil directed the estate to be held by trustees "in trust to pay over to him quarterly the net income of said estate, so long as he shall remain unmarried; and, in the event of his marriage or his dying unmarried, to convey the estate to his heirs." *Held*, that the restraint upon marriage was against the policy of the law, and the gift over was void. *Otis* v. *Prince*, 581.

See EQUITY, 1; TRUST, 2–5.

WITNESS.

1. In an action against the maker of an accommodation note, the party for whose accommodation it was made is a competent witness to prove that he negotiated it for a usurious consideration, in another state, whose laws render usurious contracts void, to a party from whom the plaintiff took it after maturity. *Newell* v. *Holton*, 349.
2. The testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory at times fails him in consequence of mental injury resulting from a sunstroke, and such is his present condition, is not to be stricken out by the presiding judge, but may be submitted to the jury. *Lewis* v. *Eagle Ins. Co.* 508.
3. An accomplice, who has testified to facts criminating the prisoner and himself, cannot afterwards decline to answer a question upon the ground that it will criminate himself. But if, after so declining, he offers to submit himself to the examination, a party who refuses the offer has no ground of exception. *Commonwealth* v. *Price*, 472.
4. It is no ground of exception that a party was allowed to ask a counsellor at law, on cross-examination, whether he had not filed interrogatories to him in behalf of the other party, and obtained a continuance of the action at the last term, and refused a continuance at this term, because the parties them-

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selves would be made competent witnesses by statute before the next term. *Winship* v. *Neale*, 382.

5. Upon the trial of an indictment for unlawful sales of intoxicating liquors, two witnesses testified that they drank such liquors together at the defendant's shop and other places; one of them testified that his object was to inform against the sellers; but both testified that the other did not know of this object, and he testified that his only object was to gratify his appetite. He was asked on cross-examination whether on leaving one of these places the other witness did not whistle for him, and answered in the negative. *Held*, that this answer was immaterial, and could not be contradicted. *Commonwealth* v. *Farrar*, 6.

3. A witness, who has been impeached by evidence that he previously testified differently, cannot be corroborated by evidence that he had made still earlier statements, not under oath nor in the prisoner's presence, in accordance with his present testimony. *Commonwealth* v. *Jenkins*, 485.

WRIT.

A writ sued out by an assignee of the estate of an insolvent debtor need not aver that he is such under the insolvent laws of the Commonwealth. *Brigham* v. *Coburn*, 329.

See REVIEW, 3; SERVICE OF WRIT; TENDER, 1.

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